United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL WITH PROOF OF SERVICE

77-7163

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

LEO M. SHORE,

Plaintiff-Appellant,

-v-

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
MAY 20 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

(6349)

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

~~JUDGE TYLER~~

7-14-75 CLASS ACTION

Jury demand date: 74 CIV. 4986

PLTFF-11/13/74

D. C. Form No. 106 Rev. JUDGE WYATT

TITLE OF CASE	ATTORNEYS
LEO M.SHORE VS. PARKLANE HOSIERY COMPANY,INC. HERBERT N. SOMEKH DENISE D.SOMEKH HERBERT N.SOMEKH,Trustee of trusts for benefit of his children CHARLES B.YAFFEE DAVID N.DAVID NEIL B.PERSKY ARTHUR GOLD	For plaintiff: Kass,Goodkind,Wechsler&Gerstein 122 E.42nd St.NYC10017 867-8570 For defendant: ~~Kaye,Scholer,Fierman,Hays&Handler~~ ~~425 Park Ave.NY10022 PL 9-8400~~ 2-5-75 Jacobs, Persinger & Parker 70 Pine St.N.Y.C. 10005 344-1866 FOR DEFTS YAFFE , GOLD, PARKLANE HOSIERY CO. DAVID, PERSKY, DD. SOMEKH, H. SOMEKH.

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk		11/13/74	Kass G	15	
			11/14/74	C.S.T.		15
J.S. 6 mailed	Marshal					
Basis of Action: Sec.Exchange Act of 1934,Viol.Secs 10&14of Sec.Exchange Act,1934.	Docket fee					
	Witness fees					
Action arose at:	Depositions					

LEO M.SHORE VS. PARKLANE HOSIERY COMPANY ,INC. ET AL

74 CIV. 498

DATE	PROCEEDINGS	Date Order or Judgment Note
Nov.13-74	Filed complaint and issued summons.	
Dec. 6-74	Filed Summons with Marshal's Return.Served Parklane Hosiery Co.Inc. by S.Newmon, 11/19/74	
Dec.24-74	Filed Pltffs request for production of documents.	
Jan. 7-75	Filed Stip&Order extending time for defts .Parklane Hosiery Co.Inc.,Herbert N.& Denise Somekh,Herbert N.Somekh,Trustee,David N.David,Neil B.Persky&Arthur Gold to answer complaint to 2/11/75.Tyler,J.	
1/21/75	Filed Suppl.Summons with Marshal's returns.Served: Herbert N.Somekh by Julia Recino on 12/4/74 Denise D. " " " " " 11/27/74 Herbert N.Somekh,Trustee by " " 12/4/74 Charles B.Yaffe by Mrs.B.Yaffe,wife on 1/15/75 Beulah Yaffe-unable to serve.Endeavor on 12/3/74 David N.David by Mrs.David,wife on 12/4/75 Neil B.Persky by Mrs. Persky,wife on 12/17/74 Carl Appel-unable to serve.Endeavor on 12/3/74 Esther Appel- " " " " " " " " Florence Mukamel" " " " " " " " Arthur Gold personally on 11/27/74 Stanley Kuschner-unable to serve.Endeavor on 11/27/74 Harold Stone- " " " " " " "	
2/5/75	Filed Stip&Order for substitution of attys.for defts.	
1/31/75	PRE-TRIAL CONFERENCE HELD [illegible]	
2/7/75	Filed Stip&Order extending time for deft Charles B.Yaffee to answer complaint to 2/11/75.Tyler,J.	
2/13/75	Filed Stip&Order extending time for deft. Parklane Hosiery Co.Inc. to respond to pltff's request for documents,to 2/18/75.Tyler,J.	
2/13/75	Filed Stip&Order extending time for defts Parklane Hosiery Co.Inc.Herbert N. Somekh,Herbert N.Somekh,David,Persky,Yaffee&Gold to answer complaint to 2/25/75.Tyler,J.	
2/19/75	Filed Applicant's Affdvt&Notice of motion for leave to intervene pursuant to Rule 24 FRCP	
2/19/75	Filed Applicant's Memorandum of law in support of motion to intervene " " Rule 24 FRCP.	
2/19/75	Filed Deft.Parklane Hosiery Company,Inc.response to request for production of documents.	
2/19/75	Filed Defts .Notice to take deposition of pltff. ,Issued subpoenas.	
2/26/75	Filed Stip&Order extending time for defts Parklane Hosiery Company,Inc. H.N.Somekh, D.D.Somekh,Herbert N.Somekh,Trustee,David,Persky,Yaffee and Arthur Gold to answer to 3/4/75.Tyler,J.	
3/6/75	Filed Affdvt of Stuart D.Wechsler for pltff in opposition to motion of certain shareholders to intervene,etc.	
3/6/75	Filed Pltff's Memorandum of law in opposition to Intervenors " to intervene	
3/6/75	Filed Stip&Order adjourning taking deposition of pltff to 3/17/75.Tyler,J.	
2/27/75	Filed pltffs request for production of documents(2nd set)	
2/27/75	Filed " notice to take deposition upon oral exam&request to produceof Deft. Herbert N.Somekh	
3-10-75	Filed Memo-End on back of motion filed 2-19-75.....Motion denied w/o prejudice upon condition that pltffs' counsel must move for a class action designation before 3-28-75....So Ordered....Tyler,J. m/n	
3/14/75	Filed Marshal's Return.Served Parklane Hosiery Company,Inc,personally 2/20/75	
3/17/75	Filed Stip&Order adjourning deposition of pltff to 4/15/75.Tyler,J.	
3/17/75	Filed Stip&Order adjourning deposition of deft.Herbert N.Somekh to 4/29/75. Tyler,J.	
3/19/75	PRE-TRIAL [illegible] Tyler J	

(Continued)

74 Civ.4986 EEO M.SHORE VS.PARKLANE HOSIETY CO,INC. et al 74Civ.6986
D. C. 110 Rev. Civil Docket Continuation

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DATE	PROCEEDINGS
3/21/75	Filed Pltff s Affdvt in support of Claxs Action Determination .
3/21/75	Filed Memorandum of law in
3/25/75	Filed Stip&Order extending time for defts Parklane Hosiery Co.Inc.,H.N.Somekh,d Denise D.Somekh,H.N.Somekh,Trustee,David Persky,Yaffee &Gold to answer to 4/8/75 .Tyler,J.
Mar. 31-75	Mailed notice of reassignment.
Apr. 1-75	Filed deft's (Parklane Hosiery Co) response to request for production.
Apr 9.75	Filed Stip & Order that the time for defts. Parklane Hosiery Co., Inc., Herbert N. Somekh, Denise D. Somekh, Herbert N. Somekh as Trustee,David N. David, Neil B. Persky,Charles B. Yaffe, Beulah Yaffe & Arthur Gold to answer is extended to & including 4/15/75. Wyatt J.
Apr 14.75	Filed Stip &O rder that deposition of pltff. is adjourned to 5/6/75;& that the deposition of deft. is adjourned to 5/8/75. Wyatt J.
Apr 14.75	Filed Stip & Order that defts. Parklane Hosiery Co., Inc., Herbert N.Somekh, Denise D. Somekh, Herbert N. Somekh, as Trustee, David N. David, Neil B. Persky,Charles B. Yaffe, Beulah Yaffe, & Arthur Gold time to answer is extended to 5/6/75. Wyatt J.
Apr 21.75	Filed Applicants supplemental affidavit & notice of motion for order for leave to intervene. ret. 5/2/75.
Apr 22.75	Filed Pltffs. Notice of Motion for Class Determination. ret. 5/2/75.
Apr 29.75	Filed Affidavit by Stuart D.Wechsler in opposition to the renewed motion of cartain shareholders to intervene.
Apr 30.75	Filed Affidavit in opposition to motion for Class Action Determaination by Steven A. Sandaers.
May 5.75	Filed Memo. End. on motion dtd. 4/21/75. Motion denied. Wyatt J. (mailed notice)
May 5.75	Filed Memo. End. on affidavit dtd. 3/21/75. Motion granted.without opposition Settle Order on Notice. Wyatt J.
May 8.75	Filed Stip & Order that deposition of pltff. is adjourned to 6/3/75;& deposition of deft. Herbert N. Somekh is adjourned to 6/12/75. Wyatt J.
May 9.75	Filed Stip & Order that the time for defts. Parklane Hosiery Co.,Inc.,Herbert N. Somekh,Denise D. Somekh,Herbert N. Somekh etc. David N. David, Neil B.persky, Charles B. Yaffe, Beulah Yaffe & Arthur Gold to answer is extended to 6/3/75. Wyatt J.
Jun 6.75	Filed Stip & Order that thatime for defts. Parklane Hosiery Co.,Inc.,Herbert N. Somekh,Denise D. Somekh,Herbert N. Somekh as Trustee, David N.David,Neil B. Persky, Charles B. Yaffe, Beulah Yaffe, & Arthur Gold to answer is extended to 6/12/75. Wyatt J.
Jun 6.75	Filed Stip & Order that the pltffs. deposition is adjourned to 6/16/75;& deposition of deft. Herbert N. Somekh is adjouned to 6/19/75; Wyatt J.
Jun 19-75	Filed Stip & Order that the time for defts. Parklane Hosiery Co.,Inc. Herbert N.Somekh,Denise D. Somekh,Herbert N.Somekh,as Trustee,David N.David,Neil B. Persky,Charles B. Yaffe,Beulah Yaffe,& Arthur Gold to answer is extended to 6/23/75. Wyatt J.
Jun 19.75	Filed Stip & Order that the deposition of pltff. is adjourned to 7/21/75 & deposition of deft. Herbert N. Somekh is adjourned to 7/23/75. Wyatt J.
06-23-75	Filed Defts'. ANSWER. JP
07-14-75	Filed Order that the notice annexed to this Order is the best notice practicable under the circumstances & shall be mailed by the pltff.within 60 days of the date hereof, to all of the Class Members. Carter J. (mailed notice)
Jul 23.75	Filed Pltffs Request for production of documents.(3rd Set)
Jul 28.75	Filed Stip & rder that pltff. deposition is adjourned to 8-20-75;& defts. deposition is adjourned to 8-22-75. Conner J.
8-27-75	PRE-TRIAL CONFERENCE HELD BY Bart

(Continued)

Leo M. Shore vs. Parklane Hosiery Co.,Inc. 74 Civ 4986

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Wyatt J.

DATE	PROCEEDINGS	Date Or Judgment
11-06-75	Filed Pltffs. Notice of deposition of persons listed on Exhibit A attached, as indicated.	
12-03-75	Filed Stip & Order that the deposition of the Federal Reserve Bank of N.Y. & the production of documents in connection therewith, pursuant to subpoena ad testificandum & duces tecum & the time for the Federal Reserve Bank of N.Y. to move with respect to the said subpoena is extended to 12-17-75. Wyatt J.	
12-23-75	Filed stip & order that the deposition of the Federal Reserve Bank of New York and the productiin of documents in connection therewith is adjourned to 1-7-76, and the time of the Federal Reserve Bank of New York to move etc, is adjourned to 1-7-76, Werker, J.	
1-8-76	Filed stip & order that the deposition of the Federal Reserve Bank of N.Y. and the production of documents in connection therewith is adjourned to 1-14-76, and the time of the Federal Reserve Bank of New York to move with respect to the said subpoena is extended to 1-14-76. Wyatt, J.	
1-15-76	Filed stip & order that the deposition of Federal Reserve Bank of New York, etc, is extended to 1-28-76 and the the ime of the Federal Reserve Bank of New York to move with respect to said subpoena be extended to 1-28-76. Wyatt, J.	
5-24-76	Filed pltffs Affidavit & Notice of Motion for an order granting pltff leave to file an amended complaint, etc, rtble before Wyatt, J. on 6-4-76.	
5-24-76	Fil memorandum of law in support of pltffs motion for leave to serve an amended complaint.	
6-4-76	Filed stip & order that the pltffs motion to amend the complaint is extended to 6-14-76., and the time of defts to serve tha answering papers in opposition to pltffs motion is extended to 6-15-76. Wyatt, J.	
6-17-76	Filed stip & order that the retrun date of pltffs motion to amend is extended to 6-27-76m ahd the time of defts to serve the answering papers in opposition to pltffs motion is extended to 6-24-76. Wyatt, J.	
6-16-76	PRE-TRIAL CONFERENCE HELD BY BERNIKOW.	
8-25-76	Filed defts memorandum of law in opposition to pltffs motion for leave to serve an amended complaint.	
8-31-76	Filed pltffs memorandum of law in reply to defts opposition to pltffs motion for leave to serve an amended complaint.	
9-7-76	Filed memo endorsed on motion filed 5-24-76. The within motiin is granted as indicated. Wyatt, J. M/N.	
10-5-76	Filed Pltffs amended class action complaint. Pltff request trial by jury.	
9-30-76	PRE TRIAL CONF HELD MAG BERNIKOW.	
10-20-76	Filed stip & order that the time for defts named to move etc, is extended to 10-29-76, Wyatt, J.	
11-4-76	Filed stip & order that the time for defts named to answer etc, is extended to 11-12-76, Wyatt, J.	
11-15-76	Filed ANSWER of defts Parklane Hosiery Co. Inc. Charles B. Yaffe, D. N. David and Neil B. Persky to the amended complaint.	JP&P.
11-15-76	Filed ANSWER of deft H. N. Somekh, D. D. Somekh and H. N. Somekh, to the amended complai	
11-15-76	Filed ANSWER of deft B Yaffe & Arthur Gold to the amended complaint herein.	JP&P.
11-24-76	Filed Pltffs Affidvit & Notice of Motion for an order granting summary judgment to pltff etc, rtble on 12-17-76.	
11-24-76	Filed memorandum of law in support of pltffs motion for summary judgment.	
1-11-77	Filed memo in oppostiion to pltffs motion for summary judgment.	
1-12-77	Filed pltffs reply memo of law in opposition to motion for summary judgment.	
1-13-77	Filed memorandum of Law in response to pltff's reply memorandum.	
1-17-77	Filed Memo. End. on motion 11-24-76. Motion Denied...Wyatt J.	
1-24-77	Filed Pltffs. Notice of Motion to Amend Interlocutory Order. Ret. 2/4/77.	
1-24-77	Filed Pltffs. Memorandum of Law.	
1-28-77	Pre-Trial conference held by Mag. Bernikow.	

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 74-4986
Leo M. Shore,	Parklane Hoisery Co., Inc, ET.AL.	PAGE 5 OF ____ PAGES

DATE	NR.	PROCEEDINGS
		WYATT.J.
2/4/77		Filed Stip & Order That the Pltffs. Motion dated Jan. 14,1977 is adjourned to 2/10/77.... WYATT.J.
2-8-77		Filed defts. Affdvt in opposition to motion to amend order denying pltff's motion for summary judgment.
2-14-77		Filed Memo-End on Pltffs. motion filed on 1-24-77 The within motion is granted. Settle Order....So Ordered...WYATT.J. m/n
3-7-77		Filed order that the order dinying pltff;s motion for summary judgment, ent. 1-14-77 is hereby amended.....SO ORDERED....PIERCE.J. m/n
3-14-77		Filed Memo-End on Unsigned order....I decline to sign this Counter order because it does not differ in any materialley significant respects from the order signed on March 11,1977....So Ordered...WYATT.J m/n
3-15-77		Filed notice of reassignment to J. Waight m/n
4-5-77		P/C Telek Mag. Bernikow.
9-29-75		Filed Notice of appeatance of Frederick J. Cuccia, as attys for Class Members listed in Schedule A.
4-22-77		Filed Affdvt. of Service by Doris Frank on 9-8-75.
4-29-77		Filed letter to Joseph Salomon from Samuel K. Rosen dtd. 4/27/77. Re: Corrected page 6 to the Amended Complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE.

Defendants.

- X

CLASS ACTION COMPLAINT

Plaintiff requests Trial by Jury

Plaintiff, by its attorneys, Kass, Goodkind, Wechsler & Gerstein, complaining of the defendants, alleges upon information and belief, except as to paragraphs 2(f) and 3, which are alleged upon knowledge:

JURISDICTION

1. Counts I and II of this Complaint are brought under Section 27 of the Securities Exchange Act of 1934 (the "34 Act") to enforce liabilities created by Sections 10(b) and 14(a) of the 34 Act, by Rules 10b-5 and 14a-9 promulgated thereunder, and by Section 20(a). Count III is brought under the principles of pendent jurisdiction to enforce liabilities created by common law.

CLASS ACTION ALLEGATIONS

2. This action is properly maintainable as a class action under the provisions of FRCP Rule 23(b)3.

(a) The class consists of all shareholders of defendant Parklane Hosiery Company, Inc. ("Parklane"),

other than defendants, from June 15, 1973 to September 14, 1974, the record date specified in the Proxy Statement dated September 24, 1974 (the "Proxy Statement") issued in connection with the merger (the "Merger") between New PLHC Corp. ("New Corp.") with and into Parklane.

(b) On information and belief, there were several thousand persons who were beneficial owners of the common stock of Parklane during the class period.

(c) The members of the class are scattered throughout the United States and are so numerous as to make it impractical to bring them all before the Court.

(d) There are common questions of law and fact involved in this action: for example, whether defendants have engaged in schemes and artifices to defraud the members of the class while eliminating them as shareholders of Parklane by merging New Corp. into Parklane at terms grossly unfair to the members of the class; whether in furtherance of such scheme, defendants have undervalued Parklane stock for the purpose of benefiting defendants at the expense and to the damage of the class members; whether the Proxy Statement contains material misstatements and omits to state facts necessary to make the statements made not misleading; and whether the defendants thereby violated Sections 10(b) and 14 of the 34 Act and their fiduciary duties under the common law. Other common questions of law and fact are described more fully later in the complaint.

(e) Plaintiff's claims are typical of the class in that all members of the class will be damaged by

the fraudulent and unfair merger in the same manner and in the same amount per share of Parklane held.

(f) Plaintiff will fairly and adequately protect the interest of the class. Plaintiff has retained attorneys who are thoroughly experienced with securities litigation. In this connection, the attorneys for the class are "av" rated by Martindale-Hubbell Law Directory, and have extensive experience in stockholders' class actions.

(g) The class action is superior to any other method available for a fair and efficient adjudication of the controversy since it would be impractical and undesirable for each of the members of the class who may suffer damages, in light of their relatively small claims, to bring separate actions in various parts of the country. A class action based on a fraudulent and unfair merger is a proper use of the class action device and no unusual difficulties are likely to be encountered in the management of this class action.

THE PARTIES

3. Plaintiff, an individual residing at 84-37 Avon Street, Jamaica, New York owns and has owned at all relevant times, 4,300 shares of Parklane.

4. Defendant Parklane is a corporation organized under the laws of the State of New York with its principal place of business in the State of New York. Its common stock was publicly traded until the time of the Merger.

5. Defendants Herbert N. Somekh, Charles B. Yaffe, David

N. David and Neil B. Persky (the "Directors") constituted at all times relevant to the wrongs alleged, the majority of the Board of Directors of Parklane and three out of the five directors of Parklane constituted at all times relevant to the wrongs alleged all of the Board of Directors of New Corp., a New York corporation which went out of existence upon the merger. At all times relevant to the wrongs alleged the defendants controlled both corporations.

6. Defendants Herbert N. Somekh, his wife, defendant Denise D. Somekh, Herbert Somekh as trustee of trusts for the benefit of his children, Charles Yaffe, his wife, Beulah Yaffe, Carl Appel, his wife, Esther Appel, and their children, Lawrence Appel and Florence Mukamel, Arthur Gold, Stanley Kuschner and Harold Stone are and were at the time alleged herein controlling shareholders of Parklane and New Corp.

COUNT I

7. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6.

8. This count is brought to enforce rights arising out of Section 10(b) of the 34 Act, Rule 10b-5 promulgated thereunder, and Section 20(a) of the 34 Act.

9. In December, 1968 Parklane made its first public offering of its common stock at a price of $9.00 per share. As a result, the book value of the common stock of Parklane owned by the defendants at the time was increased from $1.54 to $3.39.

10. Between July, 1969 up to the present, the market value of Parklane has declined while overall during the period of time the financial structure of Parklane, in terms of cash

per share, assets per share, book value per share, shareholders' equity and other relevant factors, has significantly improved.

11. During 1973, in the light of the significantly improved financial status of Parklane and the low market value of the Parklane stock, the Directors and controlling shareholders saw the opportunity to gain for themselves a higher proportional equity participation in Parklane at a cheap price and to "freeze out" the public minority shareholders.

12. Defendants then embarked on a conspiracy, device and scheme to acquire sole control of Parklane at a price which would be highly advantageous to the defendants, but unfair and damaging to the shareholders of Parklane, other than the defendants.

13. In furtherance of this conspiracy, device and scheme, during the period June 5, 1973 to July 30, 1974 the Directors caused Parklane to purchase large blocks of stock of Parklane in an aggregate of 121,054 shares of common stock at prices varying from a low of $1.00 to a high of $3.38, and at an average price of $2.46 per share.

14. The purpose of such purchases, undisclosed to the members of the class, was to give defendants increased voting control over Parklane, and thereby facilitate their scheme to "freeze out" all public shareholders of Parklane.

15. In 1974, in furtherance of this conspiracy, device and scheme, the Directors incorporated New Corp. for the sole purpose of causing a merger of New Corp. with and into Parklane and under the relevant merger terms thereby "freeze out" the shareholders of Parklane, other than the defendants.

16. At the time of the incorporation of New Corp., the

defendants caused 672,196 shares of common stock of Parklane representing 71.6% of the issued and outstanding stock of Parklane, to be transferred to New Corp. for an equivalent number of shares of New Corp. representing 100% of the issued and outstanding shares of New Corp.

17. Thereafter, the defendants caused three of the defendants to be elected to the Board of Directors of New Corp. Said three defendants constituted the entire Board of Directors of New Corp. and said three were at the same time three out of the five Directors constituting a majority of the Board of Directors of Parklane.

18. Other than the shares of Parklane, New Corp. had no assets or business purpose, but was formed solely for the purpose of "freezing out" the minority, the plaintiff class.

19. By virtue of New Corp.'s 71.6% interest in Parklane, by virtue of the substantially identical Board of Directors of the two corporations, the defendants herein had working and voting control of Parklane. Defendants used such control to cause New Corp. to merge with and into Parklane, as a result of which all of the issued and outstanding shares of Parklane issued to New Corp. were cancelled. Each share of New Corp. common stock, which was outstanding prior to the Merger and all of which was owned by the defendants, became one share of Parklane. The plaintiff class was paid $2.00 per share cash from Parklane's assets in exchange for their shares of Parklane which were cancelled. The price of $2.00 per share was far less than the real value of Parklane stock.

20. With respect to the $2.00 merger price, the defendants

have fraudulently represented to the members of the class that the price is fair and reasonable and represents the real value of Parklane stock.

21. The defendants knew that the $2.00 price per share recommended by them was far less than the true value of the Parklane shares, but failed to disclose the same.

22. In furtherance of their conspiracy, device and scheme, the defendants caused the Proxy Statement to be distributed to the stockholders of Parklane for the sole purpose of complying with the federal and state statutory requirements with respect to holding a shareholders' meeting since the defendants themselves held the necessary votes to approve the Merger.

23. The Proxy Statement was no more than a transparent effort by the defendants to place the stamp of legality on their illicit scheme to eliminate the members of the class.

24. The Proxy Statement was, in itself, grossly misleading and fraudulent. The misstatements and omissions in the Proxy Statement are set forth in Count II of the complaint and such misstatements and omissions are included herein by reference.

25. In furtherance of the aforesaid scheme and conspiracy to defraud defendants have intentionally made their illegal take-over during the height of the "bear market" at a time when Parklane stock was selling far below past market prices.

26. Defendants thereby have "frozen out" the members of the class, all of the public minority stockholders, who have held their Parklane stock through difficult times and, thereby, the defendants acquired 100% control of Parklane at great advantage to themselves at the lowest possible price to themselves and at the highest possible expense and damage to the members of the class.

CLASS ACTION COMPLAINT

27. Defendants have intentionally and fraudulently failed to disclose the aforesaid device, scheme and conspiracy and all of the elements thereof to the members of the class, to their great damage.

28. In carrying out the foregoing fraudulent device, conspiracy and scheme, defendants have acted both singly and in concert, and are continuing to so act, to eliminate the shareholders of Parklane other than New Corp. by merging New Corp. into Parklane at grossly unfair terms. To achieve this plan, they conspired, jointly and severally, to defraud, deceive and mislead the shareholders of Parklane other than the defendants. Defendants' acts were carried out by use of the instrumentalities of interstate commerce and the mails.

29. By reason of the foregoing, defendants have violated Section 10(b) of the 34 Act, Rule 10b-5 promulgated thereunder and Section 20(a) of the 34 Act.

COUNT II

30. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6 and 8 through 29.

31. Defendants caused Parklane to distribute by use of the mails and the means and instrumentalities of interstate commerce the Proxy Statement.

32. The Proxy Statement contained material misstatements and omitted to state material facts necessary in order to make the statements therein not false and misleading. The Proxy Statement was materially false and misleading in all of the following respects:

(a) In stating that the price of $2.00 per share was fair to Parklane's shareholders other than the defendants.

(b) In failing to include in the Proxy Statement copies of opinions of Thomson & McKinnon Auchinloss, Kohlmeyer Inc. and Foster Securities Corporation, referred to in the Proxy Statement, as to the proposed price being offered to the shareholders in the Merger.

(c) In failing to properly disclose Parklane's present financial condition.

(d) In failing to disclose that, as a result of the Merger, the defendants' share in the assets, earnings, earnings capacity, cash flow and book value of Parklane would be vastly increased.

(e) In failing to disclose that the Merger was not necessary in order to avoid certain of the expenses of being a publicly held corporation, such as the expense of a transfer agent and such as the expense of being listed on the American Stock Exchange.

(f) In failing to disclose at the time of the Proxy Statement that there had been an offer of approximately $1,100,000 for a leasehold owned by Parklane.

(g) In failing to disclose any of the terms of the fraudulent scheme described in Count I herein, or even the very existence of the scheme to defraud the members of the class.

33. By reason of the foregoing, the defendants violated the provisions of Section 14(a) of the 34 Act and Rule 14a-9 promulgated thereunder, to the damage of the plaintiff and the members of the class.

COUNT III

34. Plaintiff repeats and realleges the allegations con-

tained in paragraphs 1 through 6, 8 through 29 and 30 through 33.

35. The aforesaid conspiracy, device, scheme and artifice to defraud on the part of the Parklane Directors and other defendants, and the acts and practices in the course of business carried on by them, as above described, constituted and continues to constitute (a) a breach of the fiduciary duty owed by each of them as directors and controlling shareholders to the minority shareholders of Parklane; (b) a breach of the duty of loyalty and good faith owed by each of them to the minority shareholders of Parklane in managing the affairs of Parklane; and (c) a breach of the duty owed by each of them to the minority shareholders of Parklane to act on decisions with respect to the business, properties and affairs of Parklane for the benefit of all of the shareholders of Parklane and not for the benefit of themselves.

36. As a result of the breaches of duty hereinbefore described, the shareholders of Parklane other than the defendants have suffered damages.

WHEREFORE, plaintiff prays for the following relief:

(a) That the plaintiff and the members of the class be awarded damages for their losses and defendants' profits;

(b) That the plaintiff and the members of the class be awarded punitive damages for the willful and outrageous conduct of the defendants;

(c) That plaintiff be awarded the cost and disbursements of this action, including reasonable attorneys' and experts' fees to be paid by the defendants; and

CLASS ACTION COMPLAINT

(d) That the plaintiff and the members of the class have such other and further relief as to the Court is just and equitable.

KASS, GOODKIND, WECHSLER & GERSTEIN

By _____
(A Member of the Firm)
Attorneys for the Plaintiff
122 East 42nd Street
New York, New York 10017
(212) 867-8570

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEO M. SHORE,	:	
Plaintiff,	:	74 Civ. 4986 I.B.W.
-against-	:	AFFIDAVIT IN OPPOSITION TO MOTION FOR CLASS ACTION DETERMINATION
PARKLANE HOSIERY COMPANY, INC., et al.,	:	
Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STEVEN A. SANDERS, being duly sworn, deposes and says:

1. I am an attorney and an associate of the firm of Jacobs Persinger & Parker, attorneys for those defendants who have appeared herein, and am familiar with the matters hereinafter set forth.

2. This affidavit is respectfully submitted (a) in answer to the affidavit of Stuart D. Wechsler, sworn to the 20th day of March, 1975, and (b) in opposition to plaintiff's motion for an order pursuant to Rule 23(c)(1), Fed. R. Civ. P., on the ground that maintenance of this action as a class action is improper since plaintiff has not demonstrated, despite the complaint's conclusory allegations, (i) that there are questions of law or fact common to the class as defined by plaintiff, or (ii) that the claims of

plaintiff are typical of the claims of the class as defined. In short, it is respectfully submitted that plaintiff has thus failed to satisfy two of the essential preconditions of Rule 23(a), Fed. R. Civ. P., and is therefore precluded from maintaining this action as a class action on behalf of the class as defined.

Background

3. This action arises out of a corporate merger pursuant to which defendant Parklane Hosiery Company, Inc. (the "Company") returned to the status of a privately held company which it occupied prior to December, 1968. Briefly stated, at a special meeting of shareholders held on October 14, 1974, the Company's shareholders, by the requisite vote, adopted a Plan of Merger providing for the merger of New PLHC Corp. ("Newco"), then owner of approximately 71.6% of the outstanding shares of the Company's common stock, into the Company.

4. As a result of the corporate merger which became effective on October 15, 1974:

(a) each share of the Company's common stock owned by Newco was cancelled and each share of Newco common stock became one share of the Company's common stock; and

(b) each share of the Company's common stock owned by any holder other than Newco was cancelled and upon surrender entitled the holder thereof to receive cash at the rate of $2.00 for each share held.

AFFIDAVIT IN OPPOSITION TO MOTION FOR CLASS ACTION DETERMINATION

5. According to the complaint, it is alleged that the defendants engaged in a scheme to eliminate the minority shareholders of the Company at a grossly unfair price and in connection therewith distributed a Proxy Statement dated September 24, 1974 (the "Proxy Statement") which was false and misleading in certain respects. Apart from the production of certain documents requested by plaintiff, other discovery, although noticed, has not as yet taken place.

The Purported Class

6. In his complaint (¶2(a)), plaintiff purports to represent all shareholders of the Company, other than defendants, from June 15, 1973 to September 14, 1974, the record date specified in the Proxy Statement. However, it is readily apparent from even a cursory review of the papers submitted in support of this motion, that plaintiff is unable to define, with any consistency, the class he purports to represent. As contrasted with the complaint, the Wechsler affidavit (¶2) alleges that the class includes all shareholders of the Company between June 15, 1973 and September 24, 1974, the date of the Proxy Statement. And in plaintiff's memorandum (p.1), the purported class is alleged to include all shareholders of the Company between June 15, 1973 and October 15, 1974, the date of the merger.

Plaintiff's alleged proxy fraud claim is not common to the purported class

7. While the complaint (¶33) alleges that all members of the purported class were damaged as a result of allegedly false and misleading statements contained in the Proxy Statement, the fact is that only shareholders of record

on September 14, 1974 were entitled to, and did, receive notice of the October 14, 1974 special meeting of shareholders and were entitled to vote on the Plan of Merger. Thus, the plaintiff's multiple inconsistent class definitions are erroneous. At most, only shareholders who received the Proxy Statement could be heard to complain of alleged false and misleading statements, if any, included therein.

Plaintiff's alleged merger fraud claim is not common to the purported class

8. The multiple class definitions are equally erroneous with respect to the complaint's allegations that defendants engaged in a fraudulent scheme to eliminate the minority shareholders of the Company at a grossly unfair price. Thus, plaintiff purports to represent a legally impermissible class which includes shareholders who sold their shares more than one year prior to the merger. Plaintiff's error is readily apparent since the only shareholders who the complaint alleges were damaged as a result of the alleged scheme were those shareholders who were required to surrender their shares upon the merger. The complaint contains no allegation that purported class members who sold their shares prior to the merger were in any way damaged.

Conclusion

9. It is respectfully submitted that since plaintiff has failed to comply with the prerequisites of Rule

AFFIDAVIT IN OPPOSITION TO MOTION FOR CLASS ACTION DETERMINATION

23(a), Fed. R. Civ. P., this action may not be maintained as a class action on behalf of the class as defined.

Steven A. Sanders
Steven A. Sanders

Sworn to before me this
29th day of April, 1975.

Stuart F. Glass
Notary Public

STUART F. GLASS
Notary Public, State of New York
No. 31-4523433
Qualified in New York County
Commission Expires March 30, 1976

22. Document re: Motion for Class Action Certification

Sir:—Please ta
true copy of a
duly entered
named court o

Dated:

KASS, GOO
Attorneys for
Off
1
Borough of Ma
To
Attorney fo

Sir:—Please t
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for settlement
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at
Dated.

KASS, GO
Attorneys fo
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Borough of Ma
To
Attorney

NOTICE OF ENTRY

...e take notice that the within is a (certified) ...of a ...ed in the office of the clerk of the within ...rt on 19

Yours, etc.

...OODKIND, WECHSLER & GERSTEIN

for

Office and Post Office Address

122 EAST 42nd STREET

...Manhattan New York, N. Y. 10017

for

NOTICE OF SETTLEMENT

...se take notice that

...the within is a true copy will be presented ...ent to the Hon.

...e judges of the within named Court, at

day of 19

M.

Yours, etc.

...GOODKIND, WECHSLER & GERSTEIN

for

Office and Post Office Address

122 EAST 42nd STREET

...Manhattan New York, N. Y. 10017

for

H.R.T.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEO M. SHORE,

Plaintiff,

- against -

PARKLANE HOSIERTY COMPANY, INC.,

Defendants.

AFFIDAVIT IN SUPPORT OF CLASS ACTION DETERMINATION

KASS, GOODKIND, WECHSLER & GERSTEIN

Attorneys for Plaintiff

Office and Post Office Address, Telephone

122 EAST 42nd STREET

Borough of Manhattan New York, N. Y. 10017

867-8570

To

Attorney for

Service of a certified copy of the within is hereby admitted.

Dated,

Attorney for

U. S. DISTRICT COURT
FILED
MAY 5 1975
S. D. OF N. Y.

COPY RECEIVED
DATE March 21, 1975
TIME 11:19 AM
by Norman Friedman
ATTORNEY

Motion granted without opposition. Settle order
Mgr Bleyath USDJ
May 2, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., et al.,

Defendants.

74 Civ. 4986 I.B.W.

ANSWER

- -x

Defendants, Parklane Hosiery Company, Inc., Herbert N. Somekh, Denise D. Somekh, Herbert N. Somekh, as Trustee, Charles B. Yaffe, Beulah Yaffe, David N. David, Neil B. Persky and Arthur Gold, by their attorneys, Jacobs Persinger & Parker, for their answer to the complaint herein:

FIRST: Deny each and every allegation contained in paragraph "1" of the complaint.

SECOND: Deny each and every allegation contained in the first paragraph of paragraph "2" of the complaint, except admit that plaintiff purports to bring this action under the provisions of F.R.C.P. 23(b)(3).

THIRD: Deny each and every allegation contained in subparagraph "(a)" of paragraph "2" of the complaint, except admit that a proxy statement dated September 24, 1974 was issued in connection with the merger to which proxy statement reference is made for the terms thereof.

FOURTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraphs "(b)" and "(c)" of paragraph "2" of the complaint.

ANSWER

FIFTH: Deny each and every allegation contained in subparagraphs "(d)", "(e)" and "(g)" of paragraph "2" of the complaint.

SIXTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(f)" of paragraph "2" of the complaint.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of the complaint.

EIGHTH: Deny each and every allegation contained in paragraph "5" of the complaint, except admit that New PLHC Corp., a New York corporation, was merged into Parklane.

NINTH: Deny each and every allegation contained in paragraph "6" of the complaint.

AS TO THE ALLEGED
COUNT I

TENTH: With respect to paragraph "7" of the complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" of the complaint as though the same were here set forth at length.

ELEVENTH: Deny each and every allegation contained in paragraph "8" of the complaint.

TWELFTH: Deny each and every allegation contained in paragraph "9" of the complaint, except admit that in December, 1968, Parklane sold to the public 300,000 shares of its common stock at a price of $9 per share, and that the book value of shares of Parklane's common stock held

prior to the public offering was increased (based upon Parklane's shareholders' equity at June 29, 1968) from $1.54 to $3.39 per share.

THIRTEENTH: Deny each and every allegation contained in paragraph "10" of the complaint, except admit that in or about July, 1969 the market price of Parklane common stock as reported by the American Stock Exchange was higher than the market price of such stock on or about October 15, 1974 as reported by the American Stock Exchange.

FOURTEENTH: Deny each and every allegation contained in paragraphs "11", "12", "13", "14" and "15" of the complaint.

FIFTEENTH: Deny each and every allegation contained in paragraph "16" of the complaint, except admit that at or about the time New PLHC Corp. was organized it acquired 672,196 shares of common stock of Parklane, that said number of shares amounted to approximately 71.6% of the issued and outstanding stock of Parklane, that an equivalent number of shares of New PLHC Corp. was issued, and was 100% of its outstanding stock.

SIXTEENTH: Deny each and every allegation contained in paragraph "17" of the complaint, except admit that three of the defendants were elected to the Board of Directors of New PLHC Corp., that such defendants constituted the Board of Directors of New PLHC Corp., and that said persons were at the same time three of five directors constituting a majority of the Board of Directors of Parklane.

ANSWER

SEVENTEENTH: Deny each and every allegation contained in paragraph "18" of the complaint.

EIGHTEENTH: Deny each and every allegation contained in paragraph "19" of the complaint, except admit that New PLHC Corp. merged with and into Parklane, that the issued and outstanding shares of Parklane issued to New PLHC Corp. were cancelled and that each share of New PLHC Corp. common stock which was outstanding prior to the merger became one share of Parklane.

NINETEENTH: Deny each and every allegation contained in paragraphs "20", "21", "22", "23", "24", "25", "26", "27", "28" and "29" of the complaint.

AS TO THE ALLEGED
COUNT II

TWENTIETH: With respect to paragraph "30" of the complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" and "8" through "29" of the complaint as though the same were here set forth at length.

TWENTY-FIRST: Deny each and every allegation contained in paragraph "31" of the complaint, except admit that the proxy statement was distributed by use of the mails.

TWENTY-SECOND: Deny each and every allegation contained in paragraph "32" of the complaint and in each subparagraph thereof.

TWENTY-THIRD: Deny each and every allegation contained in paragraph "33" of the complaint.

ANSWER

AS TO THE ALLEGED
COUNT III

TWENTY-FOURTH: With respect to paragraph "34" of the complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "29" and "30" through "33" of the complaint as though the same were here set forth at length.

TWENTY-FIFTH: Deny each and every allegation contained in paragraphs "35" and "36" of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

TWENTY-SIXTH: The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

TWENTY-SEVENTH: Plaintiff's exclusive remedy for the payment of the fair value of his shares is governed by Section 623 of the New York Business Corporation Law.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

TWENTY-EIGHTH: On or about January 17, 1975, plaintiff commenced an appraisal proceeding entitled In the Matter of the Petition of Leo M. Shore, etc., Index No. 1041/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant

ANSWER

to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

WHEREFORE, defendants demand judgment dismissing the complaint as against them, together with the costs and disbursements of this action.

Dated: New York, New York
June 23, 1975

JACOBS PERSINGER & PARKER

By: _____
A Member of the Firm
Attorneys for Defendants
Parklane Hosiery Company, Inc., Herbert N. Somekh, Denise D. Somekh, Herbert N. Somekh, as Trustee, Charles B. Yaffe, Beulah Yaffe, David N. David, Neil B. Persky and Arthur Gold
70 Pine Street
New York, New York 10005
Tel. No. (212) 344-1866

U.S. DISTRICT COURT
FILED
JUL 14 1975
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., et al.,

Defendants.

- X

74 Civ. 4986 I.B.W.

ORDER

This Court, by order dated May 2, 1975 having determined that this action be maintained as a class action on behalf of all shareholders of Parklane Hosiery Company, Inc. ("Parklane") on September 14, 1974 (the "Class Members"); and the Court having ordered that notice of said class action determination, in form satisfactory to this Court, be mailed to all of the Class Members; it is, hereby,

ORDERED, that the notice annexed to this Order is the best notice practicable under the circumstances and shall be mailed by the plaintiff in this action, within 60 days of the date hereof, to all of the Class Members.

Dated: New York, New York
July 9th, 1975

Robert L. Carter
U.S.D.J.

MICROFILM
JUL 14 19

NOTICE TO CERTAIN FORMER SHAREHOLDERS
OF PARKLANE HOSIERY COMPANY, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

LEO M. SHORE,

Plaintiff,

- against -

74 Civ. 4986
I.B.W.

PARKLANE HOSIERY COMPANY, INC., et al.,

Defendants.

- X

The above-entitled action has been brought as a class suit. The complaint alleges that the defendants violated certain anti-fraud provisions of the Securities Exchange Act of 1934 and principles of common law in connection with the merger of Parklane Hosiery Company, Inc. ("Parklane") and New PLHC Corp. ("New Corp."), as a result of which the plaintiff and the class members (those owners of Parklane common stock on September 14, 1974, the record date in connection with the meeting at which the merger was voted on) sustained losses. The defendants are Parklane, and certain directors and allegedly controlling shareholders of Parklane, i.e., Herbert N. Somekh, Denise D. Somekh, Herbert N. Somekh, as Trustee of trusts for the benefit of his children, Charles B. Yaffe, Beulah Yaffe, David N. David, Neil B. Persky, Carl Appel, Esther Appel, Florence Mukamel, Arthur Gold, Stanley Kuschner and Harold Stone. Not all of the defendants have appeared in the action. The complaint seeks money damages for the members of the class.

The defendants appearing in this action deny any wrongdoing and plead various defenses. No court has yet passed upon the merits of the claims.

The Court has determined that this action is maintainable as a class action under the Federal Rules of Civil Procedure, and has directed that notice be given to the members of the class. The mailing of this notice is not to be construed in any way as an expression of any opinion by the Court as to the merits, but this notice is merely to advise of the pendency of this action and of certain rights former shareholders of Parklane may have with respect to this action.

THE PURPOSE OF THIS NOTICE is to ascertain whether you want to be included in the class of shareholders on whose behalf this action has been brought. You will be considered a member of such class unless you request that you be excluded. All members of the class who do not request exclusion (in the manner stated below) will receive the benefit of a favorable decision in the action and will be bound by an adverse judgment. Under no circumstances will you be required to contribute to the expenses involved in prosecuting this action. If there is a recovery, the Court will be asked to authorize payment of the litigation expenses and reasonable fees to plaintiff's attorneys and experts, to be deducted from the amount of the recovery. In case of recovery, you will be required to prove your membership in the class and your individual damage.

The attorneys representing the class are Kass, Goodkind, Wechsler & Gerstein, 122 East 42nd Street, New York, New York 10017.

You need not do anything if you want to be included in the class. If you desire to be excluded from the class, you should write a letter or postcard to the attorneys for the class at the above-listed address requesting exclusion. Please refer to Shore v. Parklane Hosiery Company, Inc., 74 Civ. 4986, state your name and address, and also state the number of shares of Parklane which you owned on September 14, 1974. Your written request for exclusion must be received by September 30, 1975. If you do not request exclusion, you have the right to enter an appearance herein through your own counsel.

Dated: New York, New York
September 8, 1975

RAYMOND F. BURGHARDT
Clerk for the UNITED STATES
DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

32. Denton Motion Granted

Sir:—Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated.

Yours, etc.

KASS, GOODKIND, WECHSLER & GERSTEIN

Attorneys for

Office and Post Office Address

122 EAST 42nd STREET

Borough of Manhattan New York, N. Y. 10017

To

Attorney for

NOTICE OF SETTLEMENT

Sir:—Please take notice that

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated.

Yours, etc.

KASS, GOODKIND, WECHSLER & GERSTEIN

Attorneys for

Office and Post Office Address

122 EAST 42nd STREET

Borough of Manhattan New York, N. Y. 10017

To

Attorney for

Index No. 74 CIV. 4900 Year 19

(IBW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., et al.,

Defendants.

NOTICE OF MOTION TO AMEND THE COMPLAINT AND AFFIDAVIT

KASS, GOODKIND, WECHSLER & GERSTEIN

Attorneys for Plaintiff

Office and Post Office Address, Telephone

122 EAST 42nd STREET

Borough of Manhattan New York, N. Y. 10017

(212) 490-2332

To

Attorney for

Service of a certified copy of the written is hereby admitted.

Dated.

Attorney for

MICROFILM

SEP 07 1976

The within motion is granted without passing upon any of the merits or not of the claim to rescission. Any defense to that claim may be raised in any manner appropriate under applicable rules.

So Ordered

Sept 3, 1976

Mr. B.D.J.

U.S. DISTRICT COURT FILED SEP 07 1976 S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HEREBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants.

- X

74 Civ. 4986
(I.B.W.)

AMENDED CLASS ACTION COMPLAINT

Plaintiff Requests Trial By Jury

Plaintiff, by its attorneys, Kass, Goodkind, Wechsler & Gerstein, complaining of the defendants, alleges upon information and belief, except as to paragraphs 2(f) and 3, which are alleged upon knowledge:

JURISDICTION

1. Counts I, II and III of this Complaint are brought under Section 27 of the Securities Exchange Act of 1934 (the "34 Act") to enforce liabilities created by Sections 10(b), 13(a), 14(a) and 20(a) of the 34 Act, and the Rules and Regulations promulgated thereunder. Count IV is brought under the principles of pendent jurisdiction to enforce liabilities created by common law.

CLASS ACTION ALLEGATIONS

2. This action is properly maintainable as a class action under the provisions of FRCP Rule 23(b)3.

(a) The class consists of all shareholders of defendant Parklane Hosiery Company, Inc. ("Parklane"), other than defendants on September 14, 1974, the record date specified in the Proxy Statement dated September 24, 1974 (the "Proxy Statement") issued in connection with the merger (the "Merger") between New PLHC Corp. ("New Corp.") with and into Parklane.

(b) There were over seven hundred persons who were beneficial owners of the common stock of Parklane during the class period.

(c) The members of the class are scattered throughout the United States and are so numerous as to make it impractical to bring them all before the Court.

(d) There are common questions of law and fact involved in this action; for example, whether defendants have engaged in schemes and artifices to defraud the members of the class while eliminating them as shareholders of Parklane by merging New Corp. into Parklane at terms grossly unfair to the members of the class; whether in furtherance of such scheme, defendants have undervalued Parklane stock for the purpose of benefiting defendants at the expense and to the damage of the class members; whether the Proxy Statement contains material misstatements and omits to state facts necessary to make the statements made not misleading; and whether the defendants thereby violated Sections 10(b) and 14 of the 34 Act and their fiduciary duties under the common law. Other common questions of law and fact are described more fully later in the complaint.

(e) Plaintiff's claims are typical of the class in that all members of the class will be damaged by the fraudulent and unfair merger in the same manner and in the same amount per share of Parklane held.

(f) Plaintiff will fairly and adequately protect the interest of the class. Plaintiff has retained attorneys who are thoroughly experienced with securities litigation. In this connection, the attorneys for the class are "av" rated by Martindale-Hubbell Law Directory and have extensive experience in stockholders' class actions.

(g) The class action is superior to any other method available for a fair and efficient adjudication of the controversy since it would be impractical and undesirable for each of the members of the class who may suffer damages, in light of their relatively small claims, to bring separate actions in various parts of the country. A class action based on a fraudulent and unfair merger is a proper use of the class action device and no unusual difficulties are likely to be encountered in the management of this class action.

THE PARTIES

3. Plaintiff, an individual residing at 84-37 Avon Street, Jamaica, New York, owns and has owned at all relevant times, 4,300 shares of Parklane.

4. Defendant Parklane is a corporation organized under the laws of the State of New York with its principal place of business in the State of New York. Its common stock was publicly traded until the time of the Merger.

AMENDED CLASS ACTION COMPLAINT

5. Defendants Herbert N. Somekh, Charles B. Yaffe, David N. David and Neil B. Persky (the "Directors") constituted at all times relevant to the wrongs alleged, the majority of the Board of Directors of Parklane and three out of the five directors of Parklane constituted at all times relevant to the wrongs alleged, all of the Board of Directors of New Corp., a New York corporation which went out of existence upon the merger. At all times relevant to the wrongs alleged the defendants controlled both corporations.

6. Defendants Herbert N. Somekh, his wife, defendant Denise D. Somekh, Herbert Somekh as trustee of trusts for the benefit of his children, Charles Yaffe, his wife, Beulah Yaffe, Carl Appel, his wife, Esther Appel, and their children, Lawrence Appel and Florence Mukamel, Arthur Gold, Stanley Kuschner and Harold Stone are and were at the time alleged herein controlling shareholders of Parklane and New Corp.

COUNT I

7. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6.

8. This count is brought to enforce rights arising out of Section 10(b) of the 34 Act, Rule 10b-5 promulgated thereunder, and Section 20(a) of the 34 Act.

9. In December, 1968 Parklane made its first public offering of its common stock at a price of $9.00 per share. As a result, the book value of the common stock of Parklane owned by the defendants at the time was increased from $1.54 to $3.39.

10. As part of a scheme to defraud and a deceptive course of business, defendant Somekh caused Parklane to solicit its shareholders with false and misleading proxy materials for the purpose of converting Parklane to a privately-owned company as part of a plan conceived by Somekh to avail himself of Parklane's corporate assets in order to reduce his large personal indebtedness. In that connection defendant Somekh owned and controlled, directly or indirectly, a sufficient number of Parklane shares to determine the outcome of a shareholder vote in favor of converting Parklane to a privately-owned company. As part of this plan, public Parklane shareholders were to receive $2.00 per share. In the proxy materials used and disseminated to Parklane shareholders, the defendants made and caused to be made untrue statements of material facts and omitted to state material facts, as more fully described below.

11. In or about 1971, defendant Somekh personally borrowed approximately $900,000 from a bank, and thereafter, borrowed approximately $300,000 from two other banks. In or about September, 1973, the lending banks became insistent that defendant Somekh commence to reduce these outstanding financial obligations.

12. In or about June 1973, in attempting to reduce his large personal indebtedness, defendant Somekh and the other directors embarked upon a plan which provided for the conversion of Parklane from a public to a privately-owned company, and thereafter, once Parklane became privately owned [and under Somekh's control] to cause Parklane to purchase Somekh's personal real estate holdings in exchange for cash and notes which Somekh, in turn, would utilize in reducing his personal indebtedness to the banks.

AMENDED CLASS ACTION COMPLAINT

13. In furtherance of this conspiracy, device and scheme, during the period June 5, 1973 to July 30, 1974 the Directors caused Parklane to purchase large blocks of stock of Parklane in an aggregate of 121,054 shares of common stock at prices varying from a low of $1.00 to a high of $3.38, and at an average price of $2.46 per share.

14. The purpose of such purchases, undisclosed to the members of the class, was to give defendants increased voting control over Parklane, and thereby facilitate their scheme to "freeze out" all public shareholders of Parklane.

15. In 1974, in furtherance of this conspiracy, device and scheme, the Directors incorporated New Corp. for the sole purpose of causing a merger of New Corp. with and into Parklane and under the relevant merger terms thereby "freeze out" the shareholders of Parklane, other than the defendants.

16. At the time of the incorporation of New Corp., the defendants caused 672,196 shares of common stock of Parklane representing 71.6% of the issued and outstanding stock of Parklane, to be transferred to New Corp. for an equivalent number of shares of New Corp., representing 100% of the issued and outstanding shares of New Corp.

17. Thereafter, the defendants caused three of the defendants to be elected to the Board of Directors of New Corp. Said three defendants constituted the entire Board of Directors out of the five Directors constituting a majority of the Board of Directors of Parklane.

18. Other than the shares of Parklane, New Corp. had no assets or business purpose, but was formed solely for the purpose of "freezing out" the minority, the plaintiff class.

19. By virtue of New Corp.'s 71.6% interest in Parklane, and by virtue of the substantially identical Board of Directors of the two corporations, the defendants herein had working and voting control of Parklane. Defendants used such control to cause New Corp. to merge with and into Parklane, as a result of which all of the issued and outstanding shares of Parklane issued to New Corp. were cancelled. Each share of New Corp. common stock, which was outstanding prior to the Merger and all of which was owned by the defendants, became one share of Parklane. The plaintiff class was paid $2.00 per share cash from Parklane's assets in exchange for their shares of Parklane which were cancelled. The price of $2.00 per share was far less than the real value of Parklane stock.

20. With respect to the $2.00 merger price, the defendants have fraudulently represented to the members of the class that the price is fair and reasonable and represents the real value of Parklane stock.

21. The defendants knew that the $2.00 price per share recommended by them was far less than the true value of the Parklane shares, but failed to disclose the same.

22. In furtherance of their conspiracy, device and scheme, the defendants caused the Proxy Statement to be distributed to the stockholders of Parklane.

23. The Proxy Statement was no more than a transparent effort by the defendants to place the stamp of legality on their illicit scheme to eliminate the members of the class.

24. The Proxy Statement was, in itself, grossly misleading and fraudulent. The misstatements and omissions in the Proxy Statement are set forth in Count II of the complaint and such misstatements and omissions are included herein by reference.

25. Defendants thereby have illegally "frozen out" the members of ~~the class, all~~ of the public minority stockholders, for the benefit of defendant Somekh who needed Parklane's assets in order to reduce his large personal indebtedness, to the damage of the members of the class.

26. Defendants have intentionally and fraudulently failed to disclose the aforesaid device, scheme and conspiracy and all of the elements thereof to the members of the class, to their great damage.

27. In carrying out the foregoing fraudulent device, conspiracy and scheme, defendants have acted both singly and in concert to eliminate the shareholders of Parklane other than New Corp. by merging New Corp. into Parklane at grossly unfair terms. To achieve this plan, they conspired, jointly and severally, to defraud, deceive and mislead the shareholders of Parklane other than the defendants. Defendants' acts were carried out by use of the instrumentalities of interstate commerce and the mails.

28. By reason of the foregoing, defendants have violated Section 10(b) of the 34 Act, Rule 10b-5 promulgated thereunder and Section 20(a) of the 34 Act.

COUNT II

29. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6 and 8 through 27.

30. Defendants caused Parklane to distribute by use of the mails and the means and instrumentalities of interstate commerce the Proxy Statement.

31. The Proxy Statement contained material misstatements and omitted to state material facts necessary in order to make the statements therein not false and misleading including, inter alia, the following:

(a) It made statements as to various reasons why Parklane would be converted to a privately-owned company, when in fact, the true undisclosed reason for Parklane's conversion in corporate status was that Somekh was using such device in aid of meeting his personal financial obligations when there was no valid corporate purpose for such conversion in Parklane's status;

(b) It made statements concerning the termination of negotiations with the Federal Reserve Bank of New York ("FRB") with regard to Parklane's leasing of property located in New York City from the FRB, when in fact, the defendants failed to disclose the existence of ongoing negotiations with the FRB concerning the

cancellation of such leasehold rights which negotiations could have resulted in Parklane receiving substantial benefits;

(c) It made statements that Parklane had employed two appraisers to determine the fair value of Parklane stock, when in fact, the defendants failed to disclose in the proxy statement of Parklane that the two appraisers were not provided with sufficient information in order to prepare and provide a true and complete valuation of such stock.

(d) It stated that the price of $2.00 per share was fair to Parklane's shareholders other than the defendants.

(e) It did not include copies of opinions of the two appraisers.

(f) It failed to properly disclose Parklane's present financial condition.

(g) It failed to disclose that the Merger was not necessary in order to avoid certain of the expenses of being a publicly held corporation, such as the expense of a transfer agent and such as the expense of being listed on the American Stock Exchange.

(h) It failed to disclose any of the terms of the fraudulent scheme described in Count I herein, or even the very existence of the scheme to defraud the members of the class.

32. By reason of the foregoing, the defendants violated the provisions of Section 14(a) of the 34 Act and Rule 14a-9 promulgated thereunder, to the damage of the plaintiff and the members of the class.

COUNT III

33. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6, 8 through 28 and 30 and 31.

34. On or about July 10, 1975, for the fiscal year ending September 28, 1974 defendant Parklane, aided and abetted by the individual defendants, filed or caused to be filed its annual report with the Securities and Exchange Commission (the "Commission") on Form 10-K, pursuant to Section 13(a) of the Act, and Rule 13a-1 promulgated thereunder. Said Form 10-K report contained statements of material facts which were false and misleading as more fully described in Count I of this complaint and was thereby not in compliance with the aforementioned Commission rules and regulations promulgated pursuant to Section 13(a) of the Act.

35. For the fiscal year ending September 30, 1975, defendant Parklane, aided and abetted by the individual defendants, failed to file its annual report on Form 10-K pursuant to Section 13(a) of the Act and Rule 13a-1 promulgated thereunder, which Form 10-K report was due to be filed with the Commission on or about December 30, 1975.

36. On or about October 23, 1975, defendant Parklane, aided and abetted by the individual defendants filed or caused to be filed its quarterly reports with the Commission on Form 10-Q, pursuant to Section 13(a) of the Act and Rule 13a-13 promulgated thereunder for the calendar quarters ending December 31, 1974 through June 30, 1975. Said reports contained materially false and misleading statements as more fully alleged in Count I of this complaint and was thereby not in compliance with the aforementioned Commission rules and regulations promulgated pursuant to Section 13(a) of the Act.

COUNT IV

37. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6, 8 through 28 and 30 and 31.

38. The aforesaid conspiracy, device, scheme and artifice to defraud on the part of the Parklane Directors and other defendants, and the acts and practices in the course of business carried on by them, as above described, constituted and continues to constitute (a) a breach of the fiduciary duty owed by each of them as directors and controlling shareholders to the minority shareholders of Parklane; (b) a breach of the duty of loyalty and good faith owed by each of them to the minority shareholders of Parklane in managing the affairs of Parklane; and (c) a breach of duty owed by each of them to the minority shareholders of Parklane to act on decisions with respect to the business, properties and affairs of Parklane for the benefit of all of the shareholders and not for the benefit of themselves.

39. As a result of the breaches of duty hereinbefore described, the shareholders of Parklane other than the defendants have suffered damages.

WHEREFORE, plaintiff prays for the following relief:

(a) That the plaintiff and the members of the class be awarded damages for their losses and defendants' profits;

(b) That the plaintiff and the members of the class be awarded punitive damages for the willful and outrageous conduct of the defendants;

(c) That the Merger be rescinded, that corrective proxy materials be distributed to each member of the class and that Parklane be required to offer to each of the class members the return of his shares or, in the alternative, the cash equivalent of his shares as of the date of the Merger less the $2.00 already received for such shares;

(d) That plaintiff be awarded the cost and disbursements of this action, including reasonable attorneys' and experts' fees to be paid by the defendants; and

(e) That the plaintiff and the members of the class have such other and further relief as to the Court is just and equitable.

KASS, GOLDKIND, WECHSLER & GERSTEIN

By _____
(A member of the firm)
Attorneys for the Plaintiff
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"HEFFLAW" NEWYORK

U.S. DISTRICT COURT
FILED
APR 28 1977
S. D. OF N. Y.

April 27, 1977

BY HAND

74 Civ 4986 (CSH)

Joseph Salomon, Esq.
Jacobs, Persinger & Parker
70 Pine Street
New York, New York

Re: Shore v. Parklane Hosiery Company, Inc.

Dear Joe:

Enclosed is the corrected page 6 to the Amended Complaint which we have previously sent to your office. Please confirm by signing where indicated below that you were in fact served with this corrected page and that the answers which you have filed on behalf of your clients to the Amended Complaint were based upon this amended page 6.

As we have discussed, it is the purpose of your signing this letter below to facilitate our substitution of the attached page 6 with the Clerk for the United States District Court for the Southern District of New York in the Amended Complaint there on file.

Sincerely,

Samuel K. Rosen

Samuel K. Rosen

SKR:ct
enc.

CONFIRMED:

JACOBS, PERSINGER & PARKER

By Joseph N. Salomon

59A

13. In furtherance of this conspiracy, device and scheme, during the period June 5, 1973 to July 30, 1974 the Directors caused Parklane to purchase large blocks of stock of Parklane in an aggregate of 121,054 shares of common stock at prices varying from a low of $1.00 to a high of $3.38, and at an average price of $2.46 per share.

14. The purpose of such purchases, undisclosed to the members of the class, was to give defendants increased voting control over Parklane, and thereby facilitate their scheme to "freeze out" all public shareholders of Parklane.

15. In 1974, in furtherance of this conspiracy, device and scheme, the Directors incorporated New Corp. for the sole purpose of causing a merger of New Corp. with and into Parklane and under the relevant merger terms thereby "freeze out" the shareholders of Parklane, other than the defendants.

16. At the time of the incorporation of New Corp., the defendants caused 672,196 shares of common stock of Parklane representing 71.6% of the issued and outstanding stock of Parklane, to be transferred to New Corp. for an equivalent number of shares of New Corp., representing 100% of the issued and outstanding shares of New Corp.

17. Thereafter, the defendants caused three of the defendants to be elected to the Board of Directors of New Corp. Said three defendants constituted the entire Board of Directors of New Corp. and said three were at the same time three out of the five Directors, constituting a majority of the Board of Directors, of Parklane.

18. Other than the shares of Parklane, New Corp. had no assets or business purpose, but was formed solely for the purpose of "freezing out" the minority, the plaintiff class.

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., et al.,

Defendants.

74 Civ. 4986 (I.B.W.)

ANSWER TO AMENDED COMPLAINT

- -x

Defendants, Parklane Hosiery Company, Inc. ("Parklane"), Charles B. Yaffe, David N. David and Neil B. Persky, by their attorneys, Jacobs Persinger & Parker, for their answer to the amended complaint herein:

FIRST: Deny each and every allegation contained in paragraph "1" of the amended complaint.

SECOND: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph of paragraph "2" of the amended complaint.

THIRD: Deny each and every allegation contained in subparagraph "(a)" of paragraph "2" of the amended complaint, except admit that a proxy statement dated September 24, 1974 was issued in connection with the merger to which proxy statement reference is made for the terms thereof and refer to the ruling of the Court dated May 2, 1975 and the Order of the Court dated July 9, 1975.

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

FOURTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraphs "(b)" and "(c)" of paragraph "2" of the amended complaint.

FIFTH: With respect to subparagraph "(d)" of paragraph "2" of the amended complaint, deny that there is any proper or valid question of fact or law raised therein.

SIXTH: Deny each and every allegation contained in subparagraph "(e)" of paragraph "2" of the amended complaint.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(f)" of paragraph "2" of the amended complaint.

EIGHTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(g)" of paragraph "2" of the amended complaint, except deny that there is any proper or valid basis for the claim of a fraudulent and unfair merger.

NINTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of the amended complaint.

TENTH: Deny each and every allegation contained in paragraph "5" of the amended complaint, except admit that New PLHC Corp., a New York corporation, was merged into Parklane.

ELEVENTH: Deny each and every allegation contained in paragraph "6" of the amended complaint.

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

AS TO THE ALLEGED
COUNT I

TWELFTH: With respect to paragraph "7" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" of the amended complaint as though the same were here set forth at length.

THIRTEENTH: Deny each and every allegation contained in paragraph "8" of the amended complaint.

FOURTEENTH: Deny each and every allegation contained in paragraph "9" of the amended complaint, except admit that in December 1968 Parklane sold to the public 300,000 shares of its common stock at a price of $9 per share, and that the book value of shares of Parklane's common stock held prior to the public offering was increased (based upon Parklane's shareholders' equity at June 29, 1968) from $1.54 to $3.39 per share.

FIFTEENTH: Deny each and every allegation contained in paragraph "10" of the amended complaint.

SIXTEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "11" of the amended complaint.

SEVENTEENTH: Deny each and every allegation contained in paragraphs "12", "13", "14" and "15" of the amended complaint.

EIGHTEENTH: Deny each and every allegation contained in paragraph "16" of the amended complaint, except admit that at or about the time New PLHC Corp. was organized it acquired 672,196 shares of common stock of Parklane, that

said number of shares amounted to approximately 71.6% of the issued and outstanding stock of Parklane, that an equivalent number of shares of New PLHC Corp. was issued and was 100% of its outstanding stock.

NINETEENTH: Deny each and every allegation contained in paragraph "17" of the amended complaint, except admit that three of the defendants were elected to the Board of Directors of New PLHC Corp., that such defendants constituted the Board of Directors of New PLHC Corp., and that said persons were at the same time three of five directors of Parklane.

TWENTIETH: Deny each and every allegation contained in paragraph "18" of the amended complaint.

TWENTY-FIRST: Deny each and every allegation contained in paragraph "19" of the amended complaint, except admit that New PLHC Corp. merged with and into Parklane, that the issued and outstanding shares of Parklane issued to New PLHC Corp. were cancelled and that each share of New PLHC Corp. common stock which was outstanding prior to the merger became one share of Parklane.

TWENTY-SECOND: Deny each and every allegation contained in paragraphs "20", "21", "22", "23", "24", "25", "26", "27" and "28" of the amended complaint.

AS TO THE ALLEGED
COUNT II

TWENTY-THIRD: With respect to paragraph "29" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" and

"8" through "27" of the amended complaint as though the same were here set forth at length.

TWENTY-FOURTH: Deny each and every allegation contained in paragraph "30" of the amended complaint, except admit that the proxy statement was distributed by use of the mails.

TWENTY-FIFTH: Deny each and every allegation contained in paragraph "31" of the amended complaint and in each subparagraph thereof.

TWENTY-SIXTH: Deny each and every allegation contained in paragraph "32" of the amended complaint.

AS TO THE ALLEGED
COUNT III

TWENTY-SEVENTH: With respect to paragraph "33" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length.

TWENTY-EIGHTH: Deny each and every allegation contained in paragraph "34" of the amended complaint, except admit that the Parklane annual report on Form 10-K for the fiscal year ended September 28, 1974 was filed with the Securities and Exchange Commission on or about July 14, 1975.

TWENTY-NINTH: Deny each and every allegation contained in paragraph "35" of the amended complaint.

THIRTIETH: Deny each and every allegation contained in paragraph "36" of the amended complaint, except admit that the Parklane quarterly reports on Form 10-Q for

the fiscal quarters ended December 28, 1974, March 28, 1975 and June 27, 1975 were filed with the Securities and Exchange Commission on or about October 22, 1975.

AS TO THE ALLEGED
COUNT IV

THIRTY-FIRST: With respect to paragraph "37" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length.

THIRTY-SECOND: Deny each and every allegation contained in paragraphs "38" and "39" of the amended complaint.

AS AND FOR A
FIRST AFFIRMATIVE DEFENSE

THIRTY-THIRD: The amended complaint fails to state a claim upon which relief can be granted.

AS AND FOR A
SECOND AFFIRMATIVE DEFENSE

THIRTY-FOURTH: The exclusive remedy for the payment of the fair value of the shares of any purported members of the purported plaintiff class is governed by Section 623 of the New York Business Corporation Law.

AS AND FOR A
THIRD AFFIRMATIVE DEFENSE

THIRTY-FIFTH: On or about January 17, 1975, plaintiff Leo M. Shore commenced an appraisal proceeding entitled

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

In the Matter of the Petition of Leo M. Shore, etc., Index No. 1041/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A
FOURTH AFFIRMATIVE DEFENSE

THIRTY-SIXTH: On or about January 23, 1975, certain purported members of the purported plaintiff class commenced an appraisal proceeding entitled Pappalardo, et al. v. Parklane Hosiery Company, Inc., Index No. 1268/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A
FIFTH AFFIRMATIVE DEFENSE

THIRTY-SEVENTH: The purported members of the purported plaintiff class are not entitled to rescission of the October 1974 merger of New PLHC Corp. into Parklane since they did not act promptly in asserting a demand for rescission.

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

WHEREFORE, defendants demand judgment dismissing the amended complaint as against them, together with the costs and disbursements of this action.

Dated: New York, New York
November 12, 1976

JACOBS PERSINGER & PARKER

By _____
A Member of the Firm
Attorneys for Defendants
Parklane Hosiery Company, Inc., Charles B. Yaffe, David N. David and Neil B. Persky
70 Pine Street
New York, New York 10005
Tel. No. (212) 344-1866

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., et al.,

Defendants.

74 Civ. 4986 (I.B.W.)

ANSWER TO AMENDED COMPLAINT

Defendants, Herbert N. Somekh, Denise D. Somekh and Herbert N. Somekh, as Trustee, by their attorneys, Jacobs Persinger & Parker, for their answer to the amended complaint herein:

FIRST: Deny each and every allegation contained in paragraph "1" of the amended complaint.

SECOND: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph of paragraph "2" of the amended complaint.

THIRD: Deny each and every allegation contained in subparagraph "(a)" of paragraph "2" of the amended complaint, except admit that a proxy statement dated September 24, 1974 was issued in connection with the merger to which proxy statement reference is made for the terms thereof and refer to the ruling of the Court dated May 2, 1975 and the Order of the Court dated July 9, 1975.

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

FOURTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraphs "(b)" and "(c)" of paragraph "2" of the amended complaint.

FIFTH: With respect to subparagraph "(d)" of paragraph "2" of the amended complaint, deny that there is any proper or valid question of fact or law raised therein.

SIXTH: Deny each and every allegation contained in subparagraph "(e)" of paragraph "2" of the amended complaint.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(f)" of paragraph "2" of the amended complaint.

EIGHTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(g)" of paragraph "2" of the amended complaint, except deny that there is any proper or valid basis for the claim of a fraudulent and unfair merger.

NINTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of the amended complaint.

TENTH: Deny each and every allegation contained in paragraph "5" of the amended complaint, except admit that New PLHC Corp., a New York corporation, was merged into Parklane.

ELEVENTH: Deny each and every allegation contained in paragraph "6" of the amended complaint.

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

AS TO THE ALLEGED
COUNT I

TWELFTH: With respect to paragraph "7" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" of the amended complaint as though the same were here set forth at length.

THIRTEENTH: Deny each and every allegation contained in paragraph "8" of the amended complaint.

FOURTEENTH: Deny each and every allegation contained in paragraph "9" of the amended complaint, except admit that in December 1968, Parklane sold to the public 300,000 shares of its common stock at a price of $9 per share, and that the book value of shares of Parklane's common stock held prior to the public offering was increased (based upon Parklane's shareholders' equity at June 29, 1968) from $1.54 to $3.39 per share.

FIFTEENTH: Deny each and every allegation contained in paragraph "10" of the amended complaint.

SIXTEENTH: Deny each and every allegation contained in paragraph "11" of the amended complaint, except admit that in or about 1971 Herbert N. Somekh and Denise D. Somekh borrowed approximately $900,000 from a bank.

SEVENTEENTH: Deny each and every allegation contained in paragraphs "12", "13", "14" and "15" of the amended complaint.

EIGHTEENTH: Deny each and every allegation contained in paragraph "16" of the amended complaint, except admit that at or about the time New PLHC Corp. was organized it acquired 672,196 shares of common stock of Parklane, that

said number of shares amounted to approximately 71.6% of the issued and outstanding stock of Parklane, that an equivalent number of shares of New PLHC Corp. was issued and was 100% of its outstanding stock.

NINETEENTH: Deny each and every allegation contained in paragraph "17" of the amended complaint, except admit that three of the defendants were elected to the Board of Directors of New PLHC Corp., that such defendants constituted the Board of Directors of New PLHC Corp., and that said persons were at the same time three of five directors of Parklane.

TWENTIETH: Deny each and every allegation contained in paragraph "18" of the amended complaint.

TWENTY-FIRST: Deny each and every allegation contained in paragraph "19" of the amended complaint, except admit that New PLHC Corp. merged with and into Parklane, that the issued and outstanding shares of Parklane issued to New PLHC Corp. were cancelled and that each share of New PLHC Corp. common stock which was outstanding prior to the merger became one share of Parklane.

TWENTY-SECOND: Deny each and every allegation contained in paragraphs "20", "21", "22", "23", "24", "25", "26", "27" and "28" of the amended complaint.

AS TO THE ALLEGED
COUNT II

TWENTY-THIRD: With respect to paragraph "29" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" and

"8" through "27" of the amended complaint as though the same were here set forth at length.

TWENTY-FOURTH: Deny each and every allegation contained in paragraph "30" of the amended complaint, except admit that the proxy statement was distributed by use of the mails.

TWENTY-FIFTH: Deny each and every allegation contained in paragraph "31" of the amended complaint and in each subparagraph thereof.

TWENTY-SIXTH: Deny each and every allegation contained in paragraph "32" of the amended complaint.

AS TO THE ALLEGED
COUNT III

TWENTY-SEVENTH: With respect to paragraph "33" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length.

TWENTY-EIGHTH: Deny each and every allegation contained in paragraph "34" of the amended complaint, except admit that the Parklane annual report on Form 10-K for the fiscal year ended September 28, 1974 was filed with the Securities and Exchange Commission on or about July 14, 1975.

TWENTY-NINTH: Deny each and every allegation contained in paragraph "35" of the amended complaint.

THIRTIETH: Deny each and every allegation contained in paragraph "36" of the amended complaint, except admit that the Parklane quarterly reports on Form 10-Q for

the fiscal quarters ended December 28, 1974, March 28, 1975 and June 27, 1975 were filed with the Securities and Exchange Commission on or about October 22, 1975.

AS TO THE ALLEGED
COUNT IV

THIRTY-FIRST: With respect to paragraph "37" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length.

THIRTY-SECOND: Deny each and every allegation contained in paragraphs "38" and "39" of the amended complaint.

AS AND FOR A
FIRST AFFIRMATIVE DEFENSE

THIRTY-THIRD: The amended complaint fails to state a claim upon which relief can be granted.

AS AND FOR A
SECOND AFFIRMATIVE DEFENSE

THIRTY-FOURTH: The exclusive remedy for the payment of the fair value of the shares of any purported members of the purported plaintiff class is governed by Section 623 of the New York Business Corporation Law.

AS AND FOR A
THIRD AFFIRMATIVE DEFENSE

THIRTY-FIFTH: On or about January 17, 1975, plaintiff Leo M. Shore commenced an appraisal proceeding entitled

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

In the Matter of the Petition of Leo M. Shore, etc., Index No. 1041/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A
FOURTH AFFIRMATIVE DEFENSE

THIRTY-SIXTH: On or about January 23, 1975, certain purported members of the purported plaintiff class commenced an appraisal proceeding entitled Pappalardo, et al. v. Parklane Hosiery Company, Inc., Index No. 1268/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A
FIFTH AFFIRMATIVE DEFENSE

THIRTY-SEVENTH: The purported members of the purported plaintiff class are not entitled to rescission of the October 1974 merger of New PLHC Corp. into Parklane since they did not act promptly in asserting a demand for rescission.

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

WHEREFORE, defendants demand judgment dismissing the amended complaint as against them, together with the costs and disbursements of this action.

Dated: New York, New York
November 12, 1976

JACOBS PERSINGER & PARKER

By _____
A Member of the Firm
Attorneys for Defendants
Herbert N. Somekh, Denise D. Somekh and Herbert N. Somekh, as Trustee
70 Pine Street
New York, New York 10005
Tel. No. (212) 344-1866

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

LEO M. SHORE, :

Plaintiff, : 74 Civ. 4986 (I.B.W.)

-against- :

PARKLANE HOSIERY COMPANY, INC., et al., : ANSWER TO AMENDED COMPLAINT

Defendants. :

- -x

Defendants, Beulah Yaffe and Arthur Gold, by their attorneys, Jacobs Persinger & Parker, for their answer to the amended complaint herein:

FIRST: Deny each and every allegation contained in paragraph "1" of the amended complaint.

SECOND: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph of paragraph "2" of the amended complaint.

THIRD: Deny each and every allegation contained in subparagraph "(a)" of paragraph "2" of the amended complaint, except admit that a proxy statement dated September 24, 1974 was issued in connection with the merger to which proxy statement reference is made for the terms thereof and refer to the ruling of the Court dated May 2, 1975 and the Order of the Court dated July 9, 1975.

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

FOURTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraphs "(b)" and "(c)" of paragraph "2" of the amended complaint.

FIFTH: With respect to subparagraph "(d)" of paragraph "2" of the amended complaint, deny that there is any proper or valid question of fact or law raised therein.

SIXTH: Deny each and every allegation contained in subparagraph "(e)" of paragraph "2" of the amended complaint.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(f)" of paragraph "2" of the amended complaint.

EIGHTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(g)" of paragraph "2" of the amended complaint, except deny that there is any proper or valid basis for the claim of a fraudulent and unfair merger.

NINTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of the amended complaint.

TENTH: Deny each and every allegation contained in paragraph "5" of the amended complaint, except admit that New PLHC Corp., a New York corporation, was merged into Parklane.

ELEVENTH: Deny each and every allegation contained in paragraph "6" of the amended complaint.

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

AS TO THE ALLEGED
COUNT I

TWELFTH: With respect to paragraph "7" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" of the amended complaint as though the same were here set forth at length.

THIRTEENTH: Deny each and every allegation contained in paragraph "8" of the amended complaint.

FOURTEENTH: Deny each and every allegation contained in paragraph "9" of the amended complaint, except admit that in December 1968, Parklane sold to the public 300,000 shares of its common stock at a price of $9 per share, and that the book value of shares of Parklane's common stock held prior to the public offering was increased (based upon Parklane's shareholders' equity at June 29, 1968) from $1.54 to $3.39 per share.

FIFTEENTH: Deny each and every allegation contained in paragraph "10" of the amended complaint.

SIXTEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "11" and "12" of the amended complaint.

SEVENTEENTH: Deny each and every allegation contained in paragraphs "13", "14" and "15" of the amended complaint.

EIGHTEENTH: Deny each and every allegation contained in paragraph "16" of the amended complaint, except admit that at or about the time New PLHC Corp. was organized it acquired 672,196 shares of common stock of Parklane, that

said number of shares amounted to approximately 71.6% of the issued and outstanding stock of Parklane, that an equivalent number of shares of New PLHC Corp. was issued and was 100% of its outstanding stock.

NINETEENTH: Deny each and every allegation contained in paragraph "17" of the amended complaint, except admit that three of the defendants were elected to the Board of Directors of New PLHC Corp., that such defendants constituted the Board of Directors of New PLHC Corp., and that said persons were at the same time three of five directors of Parklane.

TWENTIETH: Deny each and every allegation contained in paragraph "18" of the amended complaint.

TWENTY-FIRST: Deny each and every allegation contained in paragraph "19" of the amended complaint, except admit that New PLHC Corp. merged with and into Parklane, that the issued and outstanding shares of Parklane issued to New PLHC Corp. were cancelled and that each share of New PLHC Corp. common stock which was outstanding prior to the merger became one share of Parklane.

TWENTY-SECOND: Deny each and every allegation contained in paragraphs "20", "21", "22", "23", "24", "25", "26", "27" and "28" of the amended complaint.

AS TO THE ALLEGED
COUNT II

TWENTY-THIRD: With respect to paragraph "29" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" and

"8" through "27" of the amended complaint as though the same were here set forth at length.

TWENTY-FOURTH: Deny each and every allegation contained in paragraph "30" of the amended complaint, except admit that the proxy statement was distributed by use of the mails.

TWENTY-FIFTH: Deny each and every allegation contained in paragraph "31" of the amended complaint and in each subparagraph thereof.

TWENTY-SIXTH: Deny each and every allegation contained in paragraph "32" of the amended complaint.

AS TO THE ALLEGED
COUNT III

TWENTY-SEVENTH: With respect to paragraph "33" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length.

TWENTY-EIGHTH: Deny each and every allegation contained in paragraph "34" of the amended complaint, except admit that the Parklane annual report on Form 10-K for the fiscal year ended September 28, 1974 was filed with the Securities and Exchange Commission on or about July 14, 1975.

TWENTY-NINTH: Deny each and every allegation contained in paragraph "35" of the amended complaint.

THIRTIETH: Deny each and every allegation contained in paragraph "36" of the amended complaint, except admit that the Parklane quarterly reports on Form 10-Q for

the fiscal quarters ended December 28, 1974, March 28, 1975 and June 27, 1975 were filed with the Securities and Exchange Commission on or about October 22, 1975.

AS TO THE ALLEGED
COUNT IV

THIRTY-FIRST: With respect to paragraph "37" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length.

THIRTY-SECOND: Deny each and every allegation contained in paragraphs "38" and "39" of the amended complaint.

AS AND FOR A
FIRST AFFIRMATIVE DEFENSE

THIRTY-THIRD: The amended complaint fails to state a claim upon which relief can be granted.

AS AND FOR A
SECOND AFFIRMATIVE DEFENSE

THIRTY-FOURTH: The exclusive remedy for the payment of the fair value of the shares of any purported members of the purported plaintiff class is governed by Section 623 of the New York Business Corporation Law.

AS AND FOR A
THIRD AFFIRMATIVE DEFENSE

THIRTY-FIFTH: On or about January 17, 1975, plaintiff Leo M. Shore commenced an appraisal proceeding entitled

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

In the Matter of the Petition of Leo M. Shore, etc., Index No. 1041/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A
FOURTH AFFIRMATIVE DEFENSE

THIRTY-SIXTH: On or about January 23, 1975, certain purported members of the purported plaintiff class commenced an appraisal proceeding entitled Pappalardo, et al. v. Parklane Hosiery Company, Inc., Index No. 1268/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A
FIFTH AFFIRMATIVE DEFENSE

THIRTY-SEVENTH: The purported members of the purported plaintiff class are not entitled to rescission of the October 1974 merger of New PLHC Corp. into Parklane since they did not act promptly in asserting a demand for rescission.

ANSWER OF CERTAIN DEFENDANTS TO AMENDED COMPLAINT

WHEREFORE, defendants demand judgment dismissing the amended complaint as against them, together with the costs and disbursements of this action.

Dated: New York, New York
November 12, 1976

JACOBS PERSINGER & PARKER

By _____
A Member of the Firm
Attorneys for Defendants
Beulah Yaffee and Arthur Gold
70 Pine Street
New York, New York 10005
Tel. No. (212) 344-1866

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants.

NOTICE OF MOTION

74 Civ. 4986 (I.B.W.)

- X

S I R S :

PLEASE TAKE NOTICE, that upon the complaint and upon the annexed affidavit of Samuel K. Rosen sworn to November 24, 1976, copies of which are annexed hereto, plaintiff will move this Court at Room 1506, United States Courthouse, Foley Square, New York, New York on the 17th day of December 1976 at 2:30 P.M., or as soon thereafter as counsel can be heard, for an order granting summary judgment to plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, upon the ground that it appears from the complaint and the annexed affidavit that there is no genuine issue as to material facts and plaintiff is entitled to judgment as a matter of law, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
November 24, 1976

Yours, etc.

KASS, GOODKIND, WECHSLER & GERSTEIN

By _____
(A Member of the Firm)
Attorneys for Plaintiff
122 East 42nd Street
New York, New York (212) 490-2332

TO:
MESSRS. JACOBS, PERSINGER & PARKER
70 Pine Street
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFEE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUMMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants.

74 Civ. 4986
(I.B.W.)

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND 9(g) STATEMENT

- X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SAMUEL K. ROSEN, being duly sworn, deposes and says:

1. I am associated with the firm of Kass, Goodkind, Wechsler & Gerstein, attorneys for the plaintiff in this action and am fully familiar with the facts set forth herein. I make this affidavit in support of plaintiff's motion, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, for an order granting summary judgment in this action against defendants Parklane Hosiery Company, Inc. ("Parklane") and Herbert N. Somekh ("Somekh"). (A copy of the complaint is annexed hereto).

2. In an Opinion and Order, dated November 9, 1976, Judge Kevin Duffy of this Court, in the action entitled Securities and Exchange Commission v. Parklane Hosiery Co., Inc. (76 Civ. 2024), a copy of which is annexed hereto,* rendered a decision

*For his statement, pursuant to Rule 9(g) of the General Rules of this Court, plaintiff submits that there is no triable issue as to the contents of Judge Duffy's Opinion and Order.

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

which is dispositive of the substantive allegations in plaintiff's Amended Class Action Complaint in that substantive facts alleged in the Amended Class Action Complaint were actually litigated in that action. Thus, as stated in plaintiff's supporting memorandum, he and the other members of the class are entitled to the benefits of that decision under the doctrine of collateral estoppel and there remain no genuine issues of material fact between the plaintiff class and Parklane and Somekh.

3. This action is based upon a "squeeze out" merger (the "Merger") of the public shareholders of Parklane which plaintiff contends was effected by means of a false and misleading proxy statement (the "Proxy Statement"). As a result of the Merger, Parklane was merged into New PLHC Corp., a company whose sole asset was the 71.6% of the issued and outstanding shares of Parklane owned by the defendant insiders in this action. In full payment for their Parklane shares, the public shareholders were paid $2 per share cash whereas the defendant insiders received shares of New PLHC Corp. and the right to participate in its business.

4. By order dated May 2, 1975, this action was certified as a class action on behalf of all Parklane shareholders on September 14, 1974.

5. Plaintiff alleged in his complaint that the Proxy Statement was false and misleading in that, inter alia:

(a) It made statements as to various reasons why Parklane would be converted to a privately-owned company, when in fact, the true undisclosed reason for Parklane's conversion in corporate status was that Somekh was using such device in aid of meeting his

personal financial obligations when there was no valid corporate purpose for such conversion in Parklane's status;

(b) It made statements concerning the termination of negotiations with the Federal Reserve Board of New York ("FRB") with regard to Parklane's leasing of property located in New York City from the FRB, when in fact, the defendants failed to disclose the existence of ongoing negotiations with the FRB concerning the cancellation of such leasehold rights which negotiations could have resulted in Parklane receiving substantial benefits;

(c) It made statements that Parklane had employed two appraisers to determine the fair value of Parklane stock, when in fact, the defendants failed to disclose in the proxy statement of Parklane that the two appraisers were not provided with sufficient information in order to prepare and provide a true and complete valuation of such stock.

6. Plaintiff further alleged that the distribution of the Proxy Statement was part of a fraudulent scheme giving rise to liability to the plaintiff and other members of the class under Rule 10b-5 of the Securities Exchange Act of 1934 and the common law.

7. In his decision, Judge Duffy specifically held:

(a) "It is clear to me that the overriding purpose for the merger was to enable Somekh to repay his personal indebtedness. Had his finances been otherwise, the merger may never have occurred. There is not so much as a hint of Somekh's huge debts in the proxy

statement. The non-disclosure is clearly established." (Opinion and Order at p. 10).

(b) "I find that the October 4 conference between Somekh and the authorized representative of the FRB falls within the common usage of the term 'negotiation' [footnote omitted]. Thus, the unamended proxy material was false when stated that 'there are no negotiations at present'." (Order and Opinion at p. 13).

(c) "The failure to inform Thomson & McKinnon [one of the appraisers] of these facts and the failure to disclose the defect in the appraisal in the proxy statement is beyond question." (Order and Opinion at pp. 14 and 15).

8. Judge Duffy further found that each of the foregoing misstatements or omissions was material. (pp. 19 and 20).

WHEREFORE, for the reasons stated herein and in his supporting memorandum of law, plaintiff respectfully submits that his motion for summary judgment should be granted.

SAMUEL K. ROSEN

Sworn to before me this
24th day of November, 1976.

Notary Public

JAMES CIRIO
Notary Public, State of New York
No. 24-4614564
Qualified in Nassau County
Term Expires March 30, 19__

PLAINTIFF'S AMENDED CLASS ACTION COMPLAINT WHICH WAS ATTACHED AS AN EXHIBIT TO PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT IS REPRODUCED AT PAGES 33-45 HEREIN.

OPINION AND ORDER IN SEC ACTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

PARKLANE HOSIERY CO., INC.
HERBERT N. SOMEKH,

Defendants.

OPINION AND ORDER

76 Civ. 2024

----------x

APPEARANCES:

WILLIAM D. MORAN, ESQ.
Regional Administrator, New York
Regional Office, Securities and Exchange Commission
Attorney for Plaintiff
By: Donald N. Malawsky, Esq.
Associate Regional Administrator
Franklin D. Ormsten, Esq.
Assistant Regional Administrator
Harry L. Garmansky, Esq.
Nadine S. Liebhardt, Esq.
Of Counsel

JACOBS, PERSINGER & PARKER, ESQS.
Attorneys for Defendants
By: Irving Parker, Esq.
Of Counsel

KEVIN THOMAS DUFFY, D.J.

This action is brought by the Securities and Exchange Commission (hereinafter "SEC" or "the Commission") against Parklane Hosiery Co., Inc. and Herbert N. Somekh

under Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a) and Sections 10(b), 13(a) and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), 78m(a) and 78n(a) and the various rules promulgated thereunder. The SEC has moved this Court for a preliminary injunction against the ongoing violations and for ancillary relief to remedy those which it claims have already occurred. Rule 65, Fed.R.Civ.Proc.

Both parties have requested that the hearing on the preliminary injunction be consolidated with the trial of this action. Rule 65(a), Fed.R.Civ.Proc. That request is granted. This opinion will constitute findings of fact and conclusions of law as required by Rule 52, Fed.R.Civ. Proc.

The facts are relatively simple. The defendant, Herbert N. Somekh, was the guiding force behind the expansion of the corporate defendant Parklane Hosiery Co., Inc. which has approximately 400 retail outlets selling various articles of women's apparel.

At some point during December 1968, shares in Parklane Hosiery Co., Inc. were offered to the public pursuant to a complete registration with the SEC. Somekh, however, retained effective control of the corporation in that he and others affiliated with him owned 71.6 per cent

of the stock. Apparently, at the public offering the price of the shares advanced, or at least remained firm, but with the recession which occurred thereafter, the price of the public shares was drastically reduced. The decision was made by Somekh and his affiliates to have the corporate defendant "go private" by purchasing the public shares. The mechanics of this was to have Somekh and those associated with him, transfer their shares to a new corporation called "New PLHC Corp." which would also attempt to obtain the outstanding public shares and eventually merge with the corporate defendant, thus eliminating the public shareholders. New PLHC Corp. effectively made the tender for the public shares. Proxy material was circulated which stated that there would be a meeting of the shareholders of the corporate defendant on October 14, 1974 for the purpose of considering and acting upon "a proposal to approve and adopt a plan of merger between the company and New PLHC Corp. pursuant to which the company will become a privately held company, and each outstanding share of common stock of the company (other than shares owned by New PLHC Corp.) will be exchanged for $2 in cash . . . ." The proxy statement also indicated that the dissenting shareholders had the right to appraisal under the New York Business Corporation Law.

OPINION AND ORDER IN SEC ACTION

The SEC's complaint is that the proxy statement did not go far enough in disclosing that the true underlying purpose of having Parklane Hosiery Co., Inc. go private was to bail out Herbert Somekh from certain personal transactions. The Commission also alleges that the proxy material was inadequate in that it failed to reveal that the corporate defendant was actively engaged in attempting to negotiate the release of a lease in lower Manhattan to the Federal Reserve Bank of New York, which release could have produced sizeable cash flow to the corporation. It is further charged that these facts were not disclosed to the appraisers. The Commission also seeks injunctive relief for the failure of Parklane Hosiery Co., Inc. to file certain 10-K reports and that certain other quarterly and annual reports which were filed were false and misleading in that they did not adequately disclose the purposes of the defendants in going private and the Federal Reserve Bank negotiations.

The SEC contends that Somekh and Parklane should now be enjoined:

> " . . . it is requested that this Court (i) enjoin defendants Parklane and Somekh from further violations of the anti-fraud, proxy, and reporting provisions of the federal securities laws, (ii) order the appointment of a Special Counsel armed with all necessary powers and authority to make a determination as to the proper value of Parklane's stock, and as to the proper mode and

extent of relief to be afforded former public Parklane shareholders, (iii) order Parklane to amend its prior public filings with the Commission so as to correct and adequately disclose all material matters relating to Parklane's financial and other affairs, (iv) order the defendant Parklane to file a Form 10K for the year ending September 30, 1975, and (v) order any other relief as to this Court shall deem necessary and appropriate."

Before considering the factual issues presented, it is helpful to note that this action is but one of five now pending regarding the Parklane-New PLHC merger. Although the information provided to me regarding the other actions is at best sketchy, it appears that a private action under Rule 10b-5 is now pending before Judge Wyatt of this Court, Shore v. Parklane Hosiery Co., Inc., 74 Civ. 4986, a class action in the Eastern District of New York, a class action in New York Supreme Court and an appraisal proceeding in Nassau County Supreme Court. It must also be noted that the SEC has not sought to challenge the act of going private as a per se violation of Rule 10b-5. See Green v. Santa Fe Industries, Inc., 533 F.2d 1283 (2d Cir. 1976), cert. granted, 45 U.S.L.W. 3222 (Oct. 4, 1976); Marshel v. AFW Fabrics Corp., 533 F.2d 1277, judgment vacated for possible mootness, 45 U.S.L.W. 3279 (Oct. 4, 1976).1/

OPINION AND ORDER IN SEC ACTION

I. SOMEKH'S PERSONAL INDEBTEDNESS

Thomas E. Baggott, a vice-president of Bankers Trust Company, testified that sometime in 1971 the bank made a loan of $750,000 to Parklane Hosiery and a two year personal loan to Mr. and Mrs. Somekh of $900,000. The collateral for the personal loan consisted of the stock in Parklane held by Mr. and Mrs. Somekh, assignment or mortgaging of certain real estate, and assignment of other securities and negotiable instruments. Baggott testified that the collateral package exceeded $2 million.

Sometime in late 1971 or early 1972, Mr. Somekh made a payment in the amount of $80,000. No other payment was ever made and no attempt was made by the bank to foreclose on the collateral. On several occasions, Baggott urged Somekh to reduce the outstanding balance. Although Mr. Somekh met with bank officials to discuss selling certain of his properties, no such sales took place.

From January 1974 through that summer, Bankers Trust persisted in seeking a reduction of the outstanding balance. By March, an informal understanding had been reached that Somekh would sell off a mortgage note from the Rite-Aid Company and obtain a mortgage on his home in order to repay Bankers Trust. Although a buyer was found

for the Rite Aid mortgage, the arrangement fell through, apparently due to practical and legal problems associated with the closing.

While repayment requests were being made by Bankers Trust, the National Bank of North America stepped up efforts to obtain payment from Somekh on a guarantee obligation in the amount of $150,000. Somekh and three others had personally guaranteed a demand loan to a real estate partnership, 433 JV, of which each was a member. The bank had unsuccessfully sought repayment from Harold Strauss, one of the partners, in July 1973 and from Somekh in February 1974. On May 15, 1974, the bank wrote Somekh informing him that repayment was being demanded as of May 24, 1974, and that failure to repay by that date would result in legal action.

During the same period of time, Somekh had a demand note outstanding with First National City Bank (FNCB) in the amount of $125,000. This loan was called in as of July 2, 1974. Since no payment was made an action was commenced in New York Supreme Court on September 20, 1974, Index No. 14881-1974.

Pressed with repayment demands, Somekh began to consider having Parklane go private. Somekh testified that he first gave thought to going private in late June or early

July of 1974. About a month later, he began serious discussions with his attorneys, regarding the advisability and feasibility of such a course.

In or about August 1974, Baggott, Fried, another bank official, Somekh, and Somekh's accountant, had a meeting at which Somekh indicated that he intended to bring Parklane private as an alternative means of liquidating the personal obligation. These plans were reiterated to Baggott at a September 5th meeting with Somekh.

The proxy statement was issued as of September 24, 1974. On October 14, 1974 the merger converting the company to privately owned status took place.

Following the merger, at a December 30, 1974 meeting, Somekh's salary was increased from $90,000 to $150,000, retroactive to October 1973.2/ The Board authorized the corporate officers to purchase a parcel of land owned by Somekh in Pennsauken, New Jersey, and his interest in a limited partnership known as Riverbend Development Associates. The properties were purchased from Somekh for $1.2 million.

Baggott testified that he began to receive payments from Somekh after the merger. A $70,000 payment was

made on December 6, 1974. A $150,000 payment was received on December 31st. Thereafter, payments of $25,000 a month were received until December 1975, when the remaining balance of $355,000 was paid.

As to the outstanding indebtedness to FNCB, an agreement was reached on December 6, 1974 whereby Somekh would pay the sum of $4,000 a month until the loan was fully repaid. The National Bank of North America dispute was resolved by a $50,000 payment by Somekh sometime in November 1974.

The Commission contends that the proxy material inadequately discloses Somekh's true intention in proposing the merger: to bail out his personal financial situation. The defendants assert that the proxy statement does adequately disclose these facts and point to a paragraph under the section heading "Purpose and Background of Proposed Merger":

> "If the proposed merger is consummated, the shareholders of Newco will be entitled to the benefit of all the assets, earnings, earning capacity and cash flow of the Company. The merger will make possible a combination of the resources of the Company with those of Mr. Somekh (who with his wife and trusts for the benefit of his children, owns approximately 86% of the stock of Newco) for the conduct of real estate activities of the type that Mr. Somekh has to date conducted individually (primarily development of garden apartments). Such a combination is presently being contemplated."

It is clear to me that the overriding purpose for the merger was to enable Somekh to repay his personal indebtedness. Had his finances been otherwise, the merger may never have occurred. There is not so much as a hint of Somekh's huge debts in the proxy statement. The non-disclosure is clearly established. The importance of this information to a shareholder, i.e., its materiality, is a separate question which will be considered at a later point in this opinion.

II. NEGOTIATIONS WITH FEDERAL RESERVE BOARD OF NEW YORK

The Commission has also alleged that the proxy material misrepresents the status of discussions concerning cancellation of a lease of property by Parklane from the Federal Reserve Board of New York (hereinafter "FRB"). Specifically, it is claimed that the assertion in the proxy statement that as to the FRB lease "there are no negotiations at present" is false and misleading as to a material fact.

Parklane had leased a parcel of land on the southeast corner of John and Nassau Streets in New York City from the FRB. The land was, in turn, subleased to a franchisee of Parklane and to a third party, Jo-Ray Foods, Inc.

OPINION AND ORDER IN SEC ACTION

The FRB was in the process of constructing a building on that block and hired Robert S. Curtiss of Ely-Cruikshank Co., Inc. to negotiate a termination of the lease which had a natural expiration date of December 31, 1978. Curtiss testified that discussions with Parklane representatives began sometime in 1968 or 1969. Early on in the negotiations the FRB made an offer of $500,000; a later, January 1970 proposal, included finding new locations for the sub-tenants. By May 16, 1974, the FRB made a ten day offer of $800,000 to Parklane which would cover Parklane's interest and that of the sub-tenants.

The apparent stumbling block to a conclusion of the deal was the sub-tenant, Jo-Ray Foods. It had demanded at first $1,200,000, later $800,000, for cancellation of its interests alone. In June 1974, this demand was reduced to $600,000. Seizing on this change of position, Somekh made a June 27 counter-offer to the FRB of $1,200,000, which broke down into an allocation of $600,000 to Jo-Ray, $300,000 to the franchisee, and $300,000 to Parklane; the offer by its terms expired July 10, 1974.

On July 1, Curtiss wrote to Somekh indicating his own disappointment with the June 27 offer but indicated that it would be submitted to the FRB. The FRB did not make any effort to accept the offer before its July 10, 1974 deadline.

No significant activity transpired until October 4, 1974, when Curtiss telephoned Somekh to arrange a luncheon meeting at the Wall Street Club concerning the leasehold situation. Curtiss testified that he and Somekh indicated their mutual desire to get it resolved." Somekh reiterated his position that $1,200,000 would be necessary to close the deal. Curtiss indicated to Somekh a change in his original opinion as to the merits of his proposal and that he would now be willing to recommend the $1,200,000 figure to the FRB. Somekh agreed to accept $300,000 as Parklane's share of the deal and to attempt to obtain assurances from Jo-Ray and the franchisee. On October 7, 1974, Curtiss wrote to William F. Treiber of the FRB recommending the Somekh offer.

No amendment was made to the proxy statement following the October 4 meeting. In determining whether the proxy material is false and misleading when it indicated that "there are no negotiations at present," an examination of the correspondence of the two parties to the October 4 meeting is revealing.3/ In his October 7 letter to Treiber, Curtiss prefaced his report with the following comment:

> "Without now reviewing steps taken in this extended negotiating process as events have been reported to you, I present the current status following a long conference with Mr. Somekh previous to meeting with you last Friday afternoon October 4th."

On October 29, Somekh wrote to Baggott to advise him of his progress with respect to the FRB situation:

> "Also, and again this is off the record since until I have the money in my hand, I don't want to say that I have any deals, but I have had several conversations with the Federal Reserve and it seems that we may be heading towards a deal that would net Parklane $300,000 that can close around the end of the year. I am keeping my fingers crossed since I realize what this would mean so let's both hope it gets done."

I find that the October 4 conference between Somekh and the authorized representative of the FRB falls within the common usage of the term "negotiation."4/ Thus, the unamended proxy material was false when it stated that "there are no negotiations at present." The materiality of the FRB negotiations will be discussed at a later point.

III. THE APPRAISAL

The third area in which the Commission alleges a failure to disclose facts which are material relates to the appraisal conducted by Thomson & McKinnon, Auchincloss and Kohlmeyer, Inc. (hereinafter "Thomson & McKinnon"). Peter A. Russ, who was a vice-president of Thomson & McKinnon during the events in issue, testified that Somekh had retained the firm around August 12, 1974 to appraise the Parklane shares in connection with the merger.

Russ indicated that three techniques were used in valuing the shares. first, the net worth and assets of the company were evaluated; second, the general industry outlook was analyzed and on that basis future earnings were estimated; and third, a cash flow evaluation was made. The final appraisal, although dated August 29, 1974, was submitted September 3. It valued the stock at $1.78 per share.

Russ testified that at the time he conducted the appraisal he was not told and was not aware of Somekh's plans to use nearly $1 million of corporate assets to reduce his personal indebtedness. He was equally unaware of Somekh's intention to sell real property to the corporation. At no time was Russ, or anyone else at his firm, informed of the negotiations with the Federal Reserve Board with respect to cancellation of the leasehold at Nassau and John Streets.

The Commission asserts that the proxy statement is misleading when it sets forth the fact of an appraisal by Thomson & McKinnon but fails to disclose that the appraisal was based upon inadequate and incomplete information. While such a claim would logically fall within Rule 10b-5, I do believe that Rule 14a-9 is broad enough to encompass the claim. The failure to inform Thomson &

McKinnon of these facts and the failure to disclose the defect in the appraisal in the proxy statement is beyond question.

IV. MATERIALITY

Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(a) prohibits the solicitation of proxies through the use of the mails or means or instrumentalities of interstate commerce unless the solicitation is in compliance with the rules and regulations of the Commission. Pursuant to that authority the SEC has promulgated Rule 14a-9 which provides in part:

> "No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication written or oral, containing any statement, which, at the time and in the light of circumstances under which it was made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading . . . ."

I have already concluded that the proxy statement distributed by Parklane contains at least one misstatement and two omissions, but the inquiry does not end

there. The Supreme Court has recently emphasized the importance of demonstrating that the false or omitted facts be truly material. The Court noted that too low a standard of materiality may result in liability for insignificant non-disclosures and encourage offerors to bury the shareholder in "an avalanche of trivial information" so as to avoid liability. TSC Industries, Inc. v. Northway, Inc., 44 U.S.L.W. 4852, (June 14, 1976).

The standard set forth by the Court requires more than speculation as to the importance of the misleading or omitted fact:

> "The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with Mills general description of materiality as a requirement that 'the defect have a significant propensity to affect the voting process.' It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

Id. at 4855 (footnote omitted).

A determination of what a reasonable shareholder would consider important is more difficult where the proposed shareholder action is an acquisition of an ongoing business and the misstatement or omission relates to the attributes of the acquiring or target companies. There, a shareholder must decide whether the acquisition will enhance his investment. The distinction between what a single shareholder might subjectively consider important and that which would likely influence a reasonable shareholder can be subtle.

In the case before me, resolution of this question is simpler. Since the number of shares held by Somekh's family and associates were such that the merger and resulting elimination of public shareholders could not possibly be thwarted, the sole question facing a minority shareholder was whether to accept the $2.00 per share price or to pursue his rights as a dissenting shareholder in an appraisal proceeding. If the shareholder is only called upon to evaluate the fairness of the per share offering price, then any omission or misstatement of fact which would affect the offering price must be material under the Northway test. Anything which would affect the price, upward or downward, would necessarily be important to the shareholder in making this decision. Proceeding one step further, an omitted or

misstated fact which would have a substantial likelihood of affecting the price would, therefore, have a substantial likelihood of being considered important.

At trial, Russ testified that had he known that approximately $1 million in corporate assets would be used to reduce Somekh's indebtedness, it would have affected the appraisal. Specifically, the company was evaluated solely in the specialty retail area and without consideration of a possible change in its liquidity through land acquisitions. Russ also indicated that had he known of the FRB negotiations, it would have prompted further inquiry. The possibility of a transaction which would have netted the company $300,000 would have affected his appraisal in terms of his evaluation of cash flow. Russ testified that the fact that Parklane was merely negotiating with the FRB would not have excluded it from consideration in the appraisal.

As previously mentioned, the offering price was $0.22 higher than the Thomson & McKinnon appraisal. At the August 29, 1974 meeting of the Board of Directors of Parklane, Somekh proposed the $2.00 per share price. Stanley D. Robinson, an outside director, felt the price was inadequate and suggested between $2.50 and $3.00 per share. The minutes reflect that in supporting the $2.00

price, Somekh emphasized the Thomson & McKinnon appraisal.

Regardless of the degree of influence that the Thomson & McKinnon appraisal had on the final offering price, this Court has been presented with expert testimony, through Russ, which indicates that the omitted and misstated information bears directly upon one's ability to ascertain the fair value of the shares. Since I find that the omitted information would have had a substantial likelihood of affecting the price of the stock, a reasonable shareholder would have considered it important in deciding whether to vote to accept the $2.00 per share price or pursue his appraisal remedy.

In finding materiality as to the FRB negotiations, I am mindful of the fact that evaluation of the import ance of the non-disclosure of an anticipated event requires:

> " . . . a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."

SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969). Here, however, there is an affirmative misstatement rather than a non-disclosure. Had there been no falsity involved, the situation might have been different.5/

At first glance, misstatements regarding a transaction which could at most net the corporation $300,000 might appear to be of doubtful materiality. See SEC v. Bausch & Lomb, Inc., 73 Civ. 2458 (S.D.N.Y. Sept. 16, 1976) at 14. But in gauging their significance in terms of shareholder action, it must be kept in mind that the net earnings per year for the entire Parklane "empire" for the five years preceding the merger never exceeded $533,000.

In regard to the information withheld from Thomson & McKinnon, a minority shareholder who is faced with the task of evaluating the fairness of the per share price offered by the majority will place great weight upon an independent appraisal as revealed in the proxy statement. If that appraisal was conducted based on faulty or insufficient information, the shareholder is in a worse situation than if no appraisal were made or disclosed. He may be lulled into believing he has a valuable tool when in fact he has a meaningless nothing. When the omissions and misstatements heretofore outlined are viewed in terms of what truthful information has been disclosed, I come to the conclusion that these deficiencies are material.

V. RELIEF

Congress has authorized the SEC to seek injunctive relief "[w]henever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute a violation of this chapter, or of any rule or regulation thereunder . . ." 15 U.S.C. § 78u(e). In demonstrating the need for injunctive relief, the SEC is not required to show the same likelihood of irreparable harm which would be required from a private litigant. SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975). Cf. SEC v. Bausch & Lomb, Inc., supra. But in the final analysis general equity principles do control and establishing the wrong will not necessarily establish the right to the requested relief. 515 F.2d at 807. See SEC v. Geon Industries, Inc., 531 F.2d 39, 56 (2d Cir. 1976).

As noted in the introduction to this opinion, the SEC has requested, inter alia, the appointment of a special counsel to determine the fair value of the Parklane shares and for an injunction against future violations by defendants. In this regard I find it significant that a year and a half has elapsed from the date of the violation to the Commission's request for injunctive relief. The delay belies the claim of pressing need for the relief. See SEC v. Keller

Industries, Inc., 342 F.Supp. 654, 660 (S.D.N.Y. 1972) (Gurfein, J.).6/

To appoint a special counsel for the purpose of determining the fair value of the Parklane shares is to assume that the appraisal proceeding pending in New York Supreme Court will fail in its effort to arrive at a just and equitable price. I will not make such an assumption. Counsel for the SEC has suggested that a special counsel could be empowered to determine and pay out the difference between the true fair value and that paid to the shareholders who did not dissent. In light of the three other private actions; which are separate and apart from the appraisal proceeding and this case, I find relief of that nature to be wholly unnecessary.7/ The appointment of special counsel, receiver or trustee is a useful remedial tool, but this is not the proper case for it. See SEC v. Shapiro, 494 F.2d 1301, 1309 (2d Cir. 1974); SEC v. S & P National Corp., 360 F.2d 741, 750 (2d Cir. 1966); see also Proceedings of the Conference of the North American Securities Administrators, 1972, at pp. 95-96.

Turning to the request for an injunction against future violations, the "critical question" is whether "there is a reasonable likelihood that the wrong will be repeated." SEC v. Manor Nursing Centers, Inc., 458 F.2d

1082, 1100 (2d Cir. 1972). While "the commission of past illegal conduct is highly suggestive of the likelihood of future violations," the "totality "of circumstance" must be examined. SEC v. Management Dynamics, 515 F.2d at 807. Herbert Somekh is not a securities broker or dealer. Apart from his role in Parklane, his involvement with the securities market has been as an investor. While I do believe his violation of Section 14(a) and that of his company were knowing thus meeting the statutory requirements, I also feel that it was an isolated occurrence. No one has suggested to me that there was any impropriety connected with the 1968 public offering or any other securities transaction in which Somekh or Parklane were involved. An injunction is intended to prevent further violations and not to punish for those that have already occurred. SEC v. Geon Industries, Inc., 531 F.2d at 56. Accordingly, I see no need for an injunction against future violations as to Somekh.

Parklane is directed to amend its prior filings with the SEC to correct the misstatements and non-disclosures referred to in this opinion. If Parklane has not yet filed its Form 10K for 1975, it is ordered to do so. All other requested relief is denied.

SO ORDERED.

U. S. D. J.

Dated: New York, New York

November 9, 1976.

FOOTNOTES

1/ It is entirely possible that the Commission's decision not to challenge the merger on this ground is based upon concern over the continued viability of these cases in light of Ernst & Ernst v. Hochfelder, 44 U.S.L.W. 4419 (1976). This Court has been advised that one or more of the private actions do raise this attack. In any event, the case was not tried on that theory and my decision does not hinge thereon.

2/ Although this action had originally been approved at a September 16, 1974 meeting of the Executive Committee of Parklane, no mention of it is made in the proxy statement.

3/ Of course, the characterizations by Curtiss are not binding on Somekh or Parklane but they do constitute some evidence of what in fact occurred.

4/ See Webster's New Twentieth Century Dictionary (unabridged Second Ed. 1970) defining negotiation as "a conferring, discussing, or bargaining to reach an agreement as in business transaction or state matters."

5/ Although Curtiss testified that negotiations continue to the present day, it must be noted that the FRB deal has never been concluded. This, of course, does not necessarily affect the materiality of the misstatement. Once Parklane learned that the SEC was investigating these negotiations, it is entirely possible that it chose not to close the deal.

6/ I am not unmindful that often delays in SEC proceedings are caused by the difficulties of investigation, the myriad documents to be examined, and the prime consideration of the staff and of the Commission of the rights of possible defendants. The case cited,

FOOTNOTES, continued

6/ cont. for example, is one which I can personally attest reflects all of these factors. I am sure that the case at bar most likely tracks the same line and consideration.

7/ Counsel for the petitioners in the appraisal proceeding has indicated to this Court that substantial progress has been made:

> "The hearings before Appraiser Fink have extended for nearly a year, including discovery. Nearly 2,700 pages of transcript and 140 exhibits already have been introduced in evidence on the question of the fair value of the stock at the time Parklane went private. Extensive testimony relating to the work of Parklane's auditors is in the record, as well as testimony by its principal officers."

May 11, 1976 letter of A. Wisehart and F. Cuccia.

Decision on motion for summary judgment

...r:—Please take notice that the within is a (certified) ...ue copy of a ...ly entered in the office of the clerk of the within ...amed court on 19

...ated.

Yours, etc.

KASS, GOODKIND, WECHSLER & GERSTEIN

...ttorneys for

Office and Post Office Address

122 EAST 42nd STREET

...rough of Manhattan New York, N. Y. 10017

To

Attorney for

NOTICE OF SETTLEMENT

...ir:—Please take notice that

...f which the within is a true copy will be presented ...r settlement to the Hon.

...e of the judges of the within named Court, at

...n the day of 19

...t M.

...ated.

Yours, etc.

KASS, GOODKIND, WECHSLER & GERSTEIN

...ttorneys for

Office and Post Office Address

122 EAST 42nd STREET

Borough of Manhattan New York, N. Y. 10017

To

Attorney for

Index [redacted] Civ. 4900 Year 19
(I.B.W.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., et al.,

Defendants.

NOTICE OF MOTION, AFFIDAVIT AND 9(g) STATEMENT

KASS, GOODKIND, WECHSLER & GERSTEIN

Attorneys for Plaintiff

Office and Post Office Address, Telephone

122 EAST 42nd STREET

Borough of Manhattan New York, N. Y. 10017

~~XXXXXXX~~ 490-2332

To

Attorney for

Service of a certified copy of the written is hereby admitted.

Dated.

Attorney for

COPY RECEIVED

DATE 24 Nov 76

TIME 3:30 PM

JACOBS PERSINGER & PARKER /JLS

ATTORNEYS FOR

U. S. DISTRICT COURT
FILED
JAN 17 1977
S. D. OF N. Y.

The within motion is denied Rachal v Hill 435 F2d 59 (5th Cir 1970) So ordered Jan. 14, 1977 Mgr Bluyet USDJ

MICROFILM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., et al.,

Defendants.

74 Civ. 4986
(I.B.W.)

NOTICE OF MOTION TO AMEND INTERLOCUTORY ORDER

- X

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Samuel K. Rosen, sworn to on the 24th day of January, 1977, and upon all prior proceedings and papers in this action, the undersigned will move this Court at a motion term thereof to be held in Room 706, United States Courthouse, Foley Square, New York, New York 10007, on the 4th day of February, 1977, at 2:30 P.M. or as soon thereafter as counsel can be heard for an order, pursuant to 28 U.S.C. §1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure, amending this Court's order entered January 14, 1977, to include in such order a statement that:

(1) Said order involves a controlling question of law as to which there are substantial grounds for difference of opinion; and

(2) An immediate appeal from that order may materially advance the ultimate termination of this litigation; and

(3) For such further and other relief as to the Court seems just, proper and equitable.

Dated: New York, New York
January 24, 1977

Yours, etc.

KASS, GOODKIND, WECHSLER & GERSTEI

By _____
(A Member of the Firm)
Attorneys for Plaintiff
122 East 42nd Street
New York, New York 10017
(212) 490-2332

TO: Jacobs, Persinger & Parker
Attorneys for Defendants
70 Pine Street
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., et al.,

Defendants.

- X

74 Civ. 4986
(I.B.W.)

AFFIDAVIT IN SUPPORT OF MOTION TO AMEND INTERLOCUTORY ORDER.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SAMUEL K. ROSEN, being duly sworn, deposes and says:

1. I am a member of the firm of Kass, Goodkind, Wechsler & Gerstein, attorneys for the plaintiff in this action and am fully familiar with the facts set forth herein. I make this affidavit in support of plaintiff's motion for an order, pursuant to 28 U.S.C. §1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure, amending the order entered by this Court January 14, 1977 to include a statement that:

(a) The January 14, 1977 order involves a controlling question of law as to which there are substantial grounds for difference of opinion;

(b) That an immediate appeal from that order may materially advance the ultimate termination of this litigation.

2. Plaintiff seeks the addition of the foregoing language to the January 14, 1977 order so that he may seek an appeal with the Court of Appeals for this Circuit of the decision relating to his motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

AFFIDAVIT IN SUPPORT OF MOTION TO AMEND INTERLOCUTORY ORDER.

3. It is clear that there are substantial grounds for difference of opinion on the question of law raised in plaintiff's summary judgment motion since the Fifth Circuit and Second Circuit have disagreed as to whether or not defendants in the position of Parklane Hosiery Company, Inc. and Herbert N. Somekh would be entitled to a jury trial as a result of the decision of Judge Duffy of this Court in Securities and Exchange Commission v. Parklane Hosiery Co., Inc. (76 Civ. 2024, November 9, 1976). See Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970) and Crane v. American Standard, 490 F.2d 332 (2d Cir. 1973). Reference is also made to plaintiff's reply memorandum in his motion for summary judgment, a copy of which is annexed hereto as Exhibit A.

4. It is also clear that an appeal from the order may materially advance the ultimate termination of this litigation since, if plaintiff's motion for summary judgment is granted, no trial on liability will be required in connection with defendants Parklane Hosiery Company, Inc. and Mr. Somekh. Furthermore, if plaintiff's motion against these two defendants is granted, after considering all of the relevant factors, plaintiff would be willing to drop as defendants the other named defendants in this action so that no trial on liability would be required at all in this action.

WHEREFORE, for the reasons stated herein, plaintiff respectfully submits that his motion for an amended order, as described above, should be granted.

Samuel K. Rosen

Sworn to before me this
24th day of January, 1977.

Notary Public

PATRICIA ANNE DONLEVY
NOTARY PUBLIC, State of New York
No. 31-4626[illegible]
Qualified in New York County
Commission Expires March 30, 19[illegible]

EXHIBITS ACCOMPANYING PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION TO AMEND INTERLOCUTORY ORDER ARE NOT REPRODUCED HEREIN.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., et al.,

Defendants.

74 Civ. 4986 (IBW)

AFFIDAVIT IN OPPOSITION TO MOTION TO AMEND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DAVID R. BIRK, being duly sworn, deposes and says:

1. I am an attorney and an associate of the firm of Jacobs Persinger & Parker, attorneys for certain of the defendants in this action, and am fully familiar with the pleadings and prior proceedings heretofore had herein and the matters hereinafter set forth.

2. This affidavit is respectfully submitted in opposition to plaintiff's motion to amend the January 14, 1977 order of this Court to include a statement, pursuant to 28 U.S.C. § 1292(b), that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

3. It is respectfully submitted that there is no valid basis for the motion. The grounds upon which the

instant motion is made are identical with those urged by plaintiff and ruled upon by this Court in denying plaintiff's motion for summary judgment -- a motion made as to two of the 14 named defendants. Thus, plaintiff, on the motion for summary judgment and now once again, mistakenly contends (a) that defendants Parklane Hosiery Company, Inc. ("Parklane") and Herbert N. Somekh ("Somekh") are collaterally estopped in this action by a decision in an earlier case and (b) that the law as to collateral estoppel differs among United States Courts of Appeal. Both contentions were fully briefed, heard and overruled.

4. More particularly, plaintiff's motion for summary judgment was based upon a contention that Parklane and Somekh, two of the 14 named defendants, are collaterally estopped by the findings and conclusions contained in the November 9, 1976 Opinion and Order of this Court (Duffy, J.) in Securities and Exchange Commission v. Parklane Hosiery Co., Inc. and Herbert N. Somekh, 76 Civ. 2024 (KTD), wherein there was no right to trial by jury and which was tried without a jury. The motion was opposed on the ground that, in such circumstances, the said defendants are not collaterally estopped from subsequently litigating the same issues in a private civil action to be tried before a jury. The clear authority supporting the inapplicability of collateral estoppel where, as here, defendants are entitled to a jury trial, was set forth in defendants' memorandum in opposition to the summary judgment motion. A copy of said memorandum is annexed hereto as Exhibit 1.

AFFIDAVIT IN OPPOSITION TO MOTION TO AMEND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

5. The contention made that the Court of Appeals for the Second Circuit has rejected this well-known principle, set forth in the leading case of Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), cert. denied, 403 U.S. 904 (1971), was shown to be erroneous in defendants' responsive memorandum (pp. 4-7), a copy of which is annexed hereto as Exhibit 2. It is respectfully submitted that there is, in fact, no substantial ground for difference of opinion as to the inapplicability of collateral estoppel here.

6. Furthermore, since plaintiff's prior motion sought summary judgment on the issue of liability against only two of the 14 named defendants, an appeal from the January 14, 1977 order denying the said motion would not materially advance the ultimate termination of this litigation. Even if plaintiff were granted summary judgment, a jury trial would be required not only to determine damages, but also to determine the issue of liability as to the 12 remaining defendants.

7. Based upon the foregoing, it is respectfully submitted that plaintiff's motion to amend the January 14, 1977 order of this Court should be denied in all respects.

David R. Birk

Sworn to before me this
7th day of February, 1977.

Notary Public

JEFFREY SLONIM
Notary Public, State of New York
No. 24-4676138
Qualified in Kings County
Commission Expires March 30, 1978

EXHIBITS ACCOMPANYING AFFIDAVIT IN OPPOSITION TO MOTION TO AMEND INTERLOCUTORY ORDER ARE NOT REPRODUCED HEREIN. THEY MAY BE LOCATED AT DOCUMENT 73 IN THE INDEX TO THE RECORD ON APPEAL.

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
MAR 7 1977
S.D. OF N.Y.

- X

LEO M. SHORE,

Plaintiff,

-against-

PARKLANE HOSIERY COMPANY, INC., et al.,

Defendants.

- X

ORDER AMENDING INTERLOCUTORY ORDER

Index No. 74 Civ. 4986
(IBW)

This matter having come on for hearing upon plaintiff's motion for an order amending this Court's order entered January 14, 1977, which denied plaintiff's motion for summary judgment, to include therein certain statements required by 28 U.S.C.A. §1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure required for a petition for permission to appeal, and this Court, upon reading the papers submitted in support of this motion, all prior papers and proceedings herein, and having heard, on February 10, 1977, argument of counsel, it is

ORDERED, that the order denying plaintiff's motion for summary judgment, entered January 14, 1977, herein is hereby amended to include the following:

(1) This order involves a controlling question of law as to which there is substantial ground for difference of opinion, to wit:

> Whether the Court's findings of fact in a prior action commenced by the Securities and Exchange Commission ("SEC") can, by the doctrine of collateral estoppel, be applied to a subsequent action by a different plaintiff, seeking legal and equitable relief, based on the same transactions as was the action commenced by the SEC, when (a) there was no right to a jury trial in that action and (b) the Court found that the subject transaction was effected by means of materially misleading statements and omissions.

MICROFILM
MAR 7 1977

FILED [illegible]
SIGNED [illegible]
SERVED
RECEIVED [illegible]
DIARY [illegible]
REGISTER [illegible]
EXAMINED

(2) An immediate appeal from this order may materially advance the ultimate termination of this litigation.

Dated: New York, New York
March 3, 1977

SO ORDERED: 3/4/77

Inzer B. Wyatt
U.S.D.J.

NOTICE OF ENTRY

Sir:—Please take notice that the within is a (certified) true copy of a
duly entered in the office of the clerk of the within named court on *19*

Dated.

Yours, etc.

KASS GOODKIND, WECHSLER & GERSTEIN

Attorneys for

Office and Post Office Address

122 EAST 42nd STREET

Borough of Manhattan New York, N. Y. 10017

To

Attorney for

114.

NOTICE OF SETTLEMENT

Sir:—Please take notice that an Order
and/or Interlocutory Order

of which the within is a true copy will be presented for settlement to the Hon. Inger B. [illegible]

one of the judges of the within named Court, at
Motion Part
on March *day of* March *19*77
at 2:30 P. *M.*
Dated March 3, 1977

Yours, etc.

KASS GOODKIND, WECHSLER & GERSTEIN
Attorneys for Defendants

Office and Post Office Address

122 EAST 42nd STREET

Borough of Manhattan New York, N. Y. 10017

To Jacobs Persinger & Parker
Attorney for Defendants

Index No. 74 Civ. 4936 *Year 19*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEO V. GIORI,

Plaintiff,

-against-

[illegible],

Defendant.

[illegible]

KASS GOODKIND, WECHSLER & GERSTEIN

Attorneys for [illegible]

Office and Post Office Address, Telephone

122 EAST 42nd STREET

Borough of Manhattan New York, N. Y. 10017

490-2332

To

Attorney for

Service of a certified copy of the within is hereby admitted.

Dated.

Attorney for

BEST COPY AVAILABLE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

JOHN BYRNES, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 21-59 42-ST ASTORIA, N.Y.

That on the 20 day of MAY, 1977, deponent personally served the within JOINT APPENDIX

upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 1 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

JACOBS, PERSINGER + PARKER
ATTORNEYS FOR DEFENDANTS-APPELLEES
70 PINE ST.
NEW YORK, N.Y. 10005

John Byrnes

Sworn to before me this
20 day of May, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979